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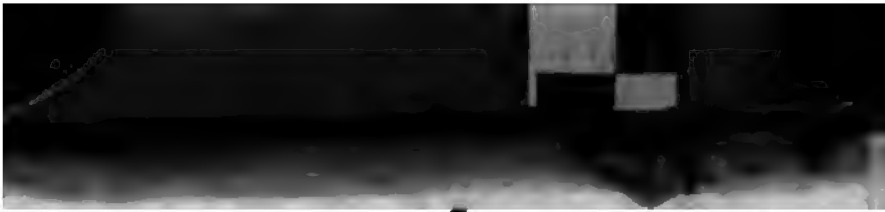
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Inv. 80. A. 19

1947-48

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REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Court of Exchequer in Equity;

FROM

TRINITY TERM, 4 WILL. IV. TO MICHAELMAS TERM,
6 WILL. IV. BOTH INCLUSIVE.

WITH

TABLES OF THE CASES AND PRINCIPAL MATTERS.

BY

EDWARD YOUNGE, Esq.

OF THE MIDDLE TEMPLE, BARRISTER AT LAW;

AND

JOHN COLLYER, Esq.

OF LINCOLN'S INN, BARRISTER AT LAW.

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L. L.

7/15

G.				Marshall v. Collett	-	-	232
Gardner, White v.	-	-	385	Memoranda	-	168, 332, 444	
Gibbs, Jesus College v.	145, 445			Montriau, Sparke v.	-	-	103
Glyn v. Soares	-	-	-	Mosley, Lees v.	-	-	589
Gompertz v. Best	-	114, 619		N.			
Best v.	-	-	620	Northover, Bond v.	-	-	221
H.				Northwicke, <i>Ex parte</i>, in the Matter of the London and Birmingham Railway Company	-	-	166
Hadow v. Barnett	-	-	164	O.			
Halford, Halford v.	-	-	270	Okey, Lee v.	-	-	550
Hall v. Storer	-	-	556	Onslow, <i>Ex parte</i>, In the Matter of the London and Birmingham Railway Act	-	-	553
Harwood v. Fisher	-	-	110	Orr, Bowles v.	-	-	464
Hicks, Lovell v.	-	-	230	P.			
Himsworth, Pilkington v.	-	612		Parker, Bryan v.	-	-	170
Hipwell v. Knight	-	-	401	Pasmore, <i>Ex parte</i>, In re London Bridge Acts	-	-	75
Hobbs, Maber v.	-	-	585	Peach, Baldwin v.	-	-	453
Hornby, Tarleton v.	-	172, 333		Pierce v. Scott	-	-	257
J.				Pilkington v. Himsworth	-	-	612
Jesus College v. Gibbs	145, 445			Price v. Assheton	-	82, 441	
Johnson, Story v.	-	-	538	Prosser v. Edmonds	-	-	481
Jordan, Whitbread v.	-	-	303	R.			
K.				Richards, Clarke v.	-	-	351
Knight, Hipwell v.	-	-	401	Rob, Dent v.	-	-	1
L.				M'Lachlan v.	-	-	267
La Nauze, Esdaile v.	-	-	394	S.			
Layfield, <i>Ex parte</i>, in the Matter of the London Bridge Acts	-	-	79	Saxton, Margareson v.	-	-	527
Lee v. Okey	-	-	550	Scott, Pierce v.	-	-	257
Lees v. Mosley	-	-	589	Sheppard, Taylor v.	-	94, 271	
Leigh v. Macaulay	-	-	260	Sitwell, Att.-Gen. v.	-	-	559
Lewis, Cawdor (Lord) v.	-	-	427	Slatter, Slatter v.	-	-	28
Lord v. Stephens	-	-	222	Small v. Attwood	-	-	37
Lovell v. Hicks	-	-	230	Smith, Smith v.	-	-	338
M.				Soares, Glyn v.	-	-	-
Maber v. Hobbs	-	-	585	Sparke v. Montriau	-	-	103
Macaulay, Leigh v.	-	-	260	Stevens, Coates v.	-	-	66
Mac Donnell, Brooks v.	-	-	500				
M'Lachlan v. Rob	-	-	267				
Margareson v. Saxton	-	-	525				

TABLE OF THE CASES.

vii

Stevens, Lord <i>v.</i>	- - 222	Towgood, <i>Ex parte</i> , In the	
Storer, Hall <i>v.</i>	- - 556	Matter of the London	
Story <i>v.</i> Johnson	- - 538	Bridge Acts - -	588
Stuart, Barnes <i>v.</i>	- - 119	Tredwell <i>v.</i> Byrch - -	476
T.		W.	
Tarleton <i>v.</i> Hornby -	172, 333	Wetherell, Bellwood <i>v.</i>	- 211
Taylor, <i>Ex parte</i> , In the		Whitbread <i>v.</i> Jordan -	- 303
Matter of the London and		White, Blake <i>v.</i> -	- 420
Birmingham Rail-road		——— <i>v.</i> Gardner -	- 385
Company - -	- 229	Wilmot <i>v.</i> The Corporation	
Taylor <i>v.</i> Sheppard -	94, 271	of Coventry - -	- 518
Toldervy <i>v.</i> Colt -	- 240	Woodham, Barry <i>v.</i>	- 538

ERRATA.

- Page 44, note (b), for "91," read "31."
59, line 8, for "accountant," read "annuitant."
72, note (h), for "520," read "511."
166, line 12, for "40th," read "39th;" line 27, for "41st," read "42nd;" and, in the marginal note, *dele the words* "out of the purchase money."
180, line 7, for "this Court," read "the Court of Chancery."
182, note (d), for "482," read "442."
185, note (b), for "23," read "236."
241, lines 20 and 21, for "fee," read "tail."
249, note (b), for "199," read "290."
252, note (a), for "199, 207," read "290."
253, note (b), for "199," read "290."
284, note (a), for "2 Vern.," read "1 Vern."
335, note (b), for "1 Swanst.," read "3 Swanst."
337, note (a), same correction.
368, note (i), for "119," read "319."
373, note (c), for "255," read "225."
388, note (a), for "2 Gwill.," read "3 Gwill."
457, last line but two, for "allowed," read "overruled."
553, line 2, for "Birmingham," read "Southampton."
619, last line but one, for "plaintiff," read "defendant."

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

Court of Exchequer in Equity.

The Reverend WILLIAM DENT, Clerk—Plaintiff;
EDWARD, Lord Archbishop of York, JOHN ROB, THOMAS
BUCKLE, THOMAS EELES, JOHN LEIFE, WILLIAM WAL-
BANKE, WILLIAM FAINT, WILLIAM WAITES, EDWARD
HODGE, JOHN WATSON, WILLIAM SQUIRES, RICHARD
OASTLER, JOHN SANDERS WATSON, HENRY WICKHAM
HIRD, ROBERT LASCELLES, JOHN LASCELLES, and FRAN-
CES his wife, and MARY LASCELLES—Defendants.

1834.

May 27th.
June 6, 27.

THE bill in this cause stated, that the defendant, the archbishop of *York*, in right of his see, was seised of the

There is nothing
illegal in the
supposition that,
in ancient times,

a chapel and chapelry existed, to the curate or chaplain of which the rector of the parish, with the consent of all proper parties, may have assigned a portion of the tithes by way of endowment, reserving to the rector the right of patronage of the curacy; and therefore, where it appeared from ancient documents that a chapel had immemorially existed as a parochial chapel, with rites of baptism, marriage, and sepulture; and that, in early times, there were chaplains having an assignment of the tithes, as of old time, and there were appointments to the curacy from a very early period; and there was evidence of usage, on the part of the curate, to receive all small tithes of modern introduction:—*Held*, that the curate was entitled to all small tithes, except wool and lamb, which appeared from the documents to be clearly payable to the rector.

Where parishioners, dwelling within a chapelry, contribute to the repairs of the parish church, it is strong, but not conclusive, evidence that the chapel is a chapel of ease to the inhabitants of the parish, and not a separate and distinct chapelry.

It does not of necessity follow that there cannot be a parochial chapel because there has not been a union of parishes in ancient times, nor any vicarage or mother church with which the chapel can be supposed to have been anciently united. And the circumstance that there is no vicarage may be accounted for by the fact of the rectory having been conveyed to a monastery prior to the statutes 15 *Rich.* 2, and 4 *Hen.* 4.

Though it is not necessary to produce the actual deed creating a composition real, still reasonable evidence must be given to make it probable that such a deed once existed; and the mere circumstance of the possession of a piece of land mentioned in various ancient documents as having been assigned to the curate, is not a sufficient ground for any such presumption.

1834.

DENT
v.
ROB.

impropriate rectory of the parish of *Thirsk*, in the county of *York*, and that there were within the said parish of *Thirsk*, which was very extensive, a parish church, and three several chapelries, called respectively *Sowerby*, *Sandhutton*, and *Carlton*, and such parish church and chapelries respectively were distinguished by well-known boundaries; that the curate of the chapelry of *Sowerby*, for the time being, was, by endowment, grant, prescription, usage, or some other lawful ways and means, well entitled to have, receive, and take all and singular the tithes, as well great as small, yearly arising, growing, renewing, and increasing in and throughout the chapelry of *Sowerby*, and the titheable places thereof, except the tithes of corn and grain, which belonged to the archbishop of *York*, as impropriate rector of the parish of *Thirsk*: and accordingly the curates of the chapelry of *Sowerby* had always received or been paid all and singular the tithes, as well great as small, arising, growing, renewing, and increasing within the said chapelry, or the titheable places thereof (except as aforesaid), in kind, or compositions in money for the same, and particularly for the farms and lands occupied by the defendants, until the tithes were subtracted by them; that the plaintiff was, in the month of *April*, 1827, duly nominated and licensed to the curacy of the chapelry of *Sowerby*, and had ever since been and then was the curate thereof, and had, by himself and his deputies, officiated in the cure thereof, and as such curate the plaintiff had, ever since his said nomination, been entitled to have, receive, and take all and singular the tithes, as well great as small, except the tithes of corn and grain, yearly arising, growing, renewing, and increasing in and throughout the chapelry of *Sowerby*, and the titheable places thereof. The bill then stated the occupation by the defendants, except the archbishop of *York*, of lands within the chapelry, and their perception of titheable matters, and prayed the usual accounts.

The archbishop of *York*, by his answer, admitted himself to be seised in right of his see of the impropriate rectory of the parish of *Thirsk*, and that the parish contained the three chapelries of *Sowerby*, *Sandhutton*, and *Carlton*, and that, as impropriate rector, he claimed to be entitled to the tithes of corn and grain arising in and throughout the chapelry of *Sowerby*; that in *April*, 1827, the plaintiff was nominated and licensed to the curacy of the chapelry of *Sowerby*, and had ever since been curate thereof; that the defendants, *John Sanders Walton* and *Henry Wickham Hird*, were the archbishop's lessees of the impropriate rectory; and that, upon the renewal of the lease to them, the tithes of corn and grain were the only tithes upon which the defendant made his calculation in setting the fines to be paid for the renewed leases; and that a Mr. *Bower* was employed by him to make the valuation of the tithes upon that occasion; and that the defendant never claimed or pretended to be entitled to any other tithes within the chapelry of *Sowerby* than the tithes of corn and grain.

The defendants *John Rob* and *Thomas Buckle*, by their answer, admitted the archbishop of *York* to be seised, in right of his see, of the impropriate rectory of *Thirsk*, and that the parish of *Thirsk* was very extensive; that there were within the parish a vicarage and parish church; that there were three several chapelries, called respectively *Sowerby*, *Sandhutton*, and *Carlton Miniott*; and that the chapelry of *Sowerby* was within the parish of *Thirsk*, but whether the two other chapelries, or either of them, were or was within the parish, the defendants were unable to set forth. They admitted that the chapelry of *Sowerby* was distinguished by well-known boundaries; but whether the said vicarage and parish church, and the chapelries of *Sandhutton* and *Carlton*, were distinguished by well-known boundaries, they could not set forth. They believed that the nomination to the chapelry of *Sowerby* belonged to the archbishop of *York* in right of his see; but they did not know or be-

1834.

DENT
v.
ROB.

1834.

DENT

v.
ROB.

lieve that the curate of the chapelry of *Sowerby* for the time being was, by endowment, grant, prescription, usage, or otherwise, entitled to have, receive, or take all or any of the tithes, great or small, yearly arising, growing, renewing, and increasing in or throughout the chapelry, and the titheable places thereof, or any compensation for the same; for the defendants had been informed and believed that all and every the tithes, as well great as small, yearly arising, growing, renewing, and increasing in and throughout the chapelry and the titheable places thereof, or the moduses or customary payments in lieu thereof, therein-after mentioned, belonged and were of right due to the rector of the rectory of *Thirsk*, or his lessees for the time being; and that the curate of the chapelry of *Sowerby*, when duly and legally presented, was merely a perpetual stipendiary curate, and not entitled to any tithes whatsoever. The defendants then set up, as payable to the rector of the rectory of *Thirsk*, at *Michaelmas* in each and every year, by the owners and occupiers of land within the said township and chapelry of *Sowerby*, the following moduses or customary payments, *viz.* one penny an acre for every acre of meadow and pasture land, held and occupied by each and every such owner or occupier, for and in lieu and full satisfaction of the tithes of hay and grass had and taken by such occupier upon and from off his said farm and lands. The sum of three half-pence for every milch cow, kept by every owner and occupier of lands within the said parish, for and in lieu of the tithe of the milk and calves of such cow; and the sum of one penny for every barren cow, kept, fed, and depastured on the lands of every such owner or occupier, for and in lieu of the tithe of agistment of every such cow. The defendants believed, that by an indenture bearing date the 17th *April*, 1779, and made between *William*, then lord archbishop of *York*, of the one part, and *Matthew Butterwick* of *Thirsk* aforesaid, esquire, of the other part, in considera-

tion of the surrender of a former lease therein mentioned, and for other the considerations therein expressed, the said *William*, lord archbishop of *York*, demised to the said *Matthew Butterwick* the said rectory or parsonage of *Thirsk*, with the mansion-house, buildings, gardens, orchards, dove-house, barns, stables, edifices, glebe lands, pasture, feedings, tithes, oblations, obventions, fruits, rights, profits, commodities, emoluments, and advantages, with the appurtenances whatsoever to the said rectory or parsonage belonging, or in anywise appertaining; to hold the same unto the said *Matthew Butterwick*, his heirs and assigns, for and during the natural lives of three persons therein named, and the life of the longest liver of them, at the yearly rent of 20*l.*, payable half yearly as therein mentioned; and also the yearly sum of 40*l.*, to be employed by way of salary to the curate of the mother church of *Thirsk* aforesaid, to be named and appointed by the archbishop and his successors for the time being; and upon condition, also, that the said *Matthew Butterwick*, his heirs and assigns, should at all times during the term of the lives aforesaid, at their own proper costs and charges, provide, find, and keep so many other sufficient, able, and orderly allowed ministers, to say divine service, and administer the sacraments to the parishioners within the several chapelries of *Sowerby*, *Carlton*, and *Sandhutton*, belonging to the parish church of *Thirsk*, as had been accustomed to be found, kept, or allowed by the farmer or occupier of the said rectory and the parsonage, and thereof should acquit and discharge the archbishop and his successors during the term of the lives aforesaid. That, by articles of agreement, bearing date the 16th day of *December*, 1795, and made between the said *Matthew Butterwick* of the one part, and *Ralph Rob* and *Edward Buckle* of the other part, *Matthew Butterwick* covenanted and agreed, on or before the 12th of *May* then next, at the costs and charges of *Ralph Rob* and *Edward Buckle*, their heirs and as-

1834.

DENT
v.
ROB.

1834.

DENT

v.

ROB.

signs, to assign and convey unto the use of *Ralph Rob* and *Edward Buckle*, their heirs and assigns, (amongst other premises), all those the tithes of wool, lamb, corn, and grain, yearly renewing, arising, and increasing in and throughout the township of *Sowerby* aforesaid, then the property of the said *Matthew Butterwick*, and then in the occupation of the said *Edward Buckle* and *Edward Hodge*; to hold the same unto and to the use of the said *Ralph Rob* and *Edward Buckle*, their heirs and assigns, for and during the natural lives or the life of the longest liver of the several persons for whose lives the said tithes were granted to the said *Matthew Butterwick*, with all benefit and advantage of renewal from time to time upon the death of any of them; and *Ralph Rob* and *Edward Buckle* thereby covenanted and agreed to pay the same sums of money therein mentioned. That, by indentures of lease and release, bearing date respectively the 11th and 12th days of *May*, 1796, and made between the said *Matthew Butterwick* of the one part, and the said *Ralph Rob* and *Edward Buckle* of the other part, *Matthew Butterwick* granted and confirmed unto *Ralph Rob* and *Edward Buckle*, their heirs and assigns, all those the tithes and tenths of corn, grain, wool, and lamb yearly renewing, arising, increasing, growing, and becoming due in and throughout the township of *Sowerby* aforesaid, being part and parcel of the rectory and parsonage of *Thirsk* (save and except the tithes of corn, grain, wool, and lamb yearly renewing, arising, and increasing from and out of the farm and lands of Mr. *Richard Milburn*, called *Thorpe Field Farm*, situate in the township of *Sowerby* aforesaid, which tithes of the said farm had theretofore been sold to the said *Richard Milburn*, with the appurtenances); to hold the same (except as aforesaid) unto and to the use of the said *Ralph Rob* and *Edward Buckle*, their heirs and assigns for ever, for and during the several lives of the several parties for whose lives the same had been granted to the same *Matthew Butterwick*, and with such benefit

1834.

DENT
v.
ROB.

of renewal as therein mentioned. The defendants then referred to various leases and conveyances under which they derived title to the tithes granted by the last-mentioned conveyances, and they insisted that the tithes of corn and grain arising in the chapelry of *Sowerby* did not belong to the archbishop of *York*, as impropriate rector of the parish of *Thirsk*, but to the defendants, under such lease and conveyances thereof as therein mentioned. They denied the title of the curates of the chapelry of *Sowerby* to any tithes, though they believed, that, some time prior to and down to 1822, tithes of turnips, potatoes, and garden stuff, or some money compositions in lieu thereof, and the several moduses or customary payments in lieu of tithes, hay, milk, and calves, and the agistment of barren cows, were, in ignorance of the right of the curate of the chapelry, and that he was only a stipendiary curate, rendered or paid by some of the occupiers of lands in the chapelry, but not, as the defendants believed, by the occupiers of the farms and lands occupied by the defendants, to the predecessors of the plaintiff, curates of the chapelry. They believed, that, since the year 1822, no tithes whatsoever, nor any composition in money in lieu of tithes, had been rendered or paid to or received by the curates. That the tithes of wool and lamb, arising and renewing in the chapelry (except as aforesaid), were received by *Edward Buckle* and *Edward Hodge*, as the farmers or tenants of *Matthew Butterwick*, for some years prior to 1795; and that since the year 1795, down to the time aforesaid, *Ralph Rob* and *Edward Buckle*, and the defendants, had from time to time received and retained the tithes of wool and lamb under the title and conveyances therein mentioned and set forth. The defendants were unable to state whether the plaintiff had been duly nominated and licensed to the living, but they admitted that he had officiated in the cure thereof; however, they denied that, as such curate or otherwise, he had ever been or was now entitled to any of

1834.

DENT
v.
ROB.

the tithes, great or small, arising in the chapelry of *Sowerby*. The defendants admitted their occupation of lands within the chapelry of *Sowerby*, and their perception of titheable matters, and they set forth in schedules the usual accounts.

The defendants, *Thomas Eeles, John Leife, William Walbanke, William Faint, William Waites, Edward Hodge, John Watson, William Squires, and Richard Oastler*, by their answer did not admit the title of the plaintiff as curate, though they admitted that he had officiated in the cure. They admitted their occupation of lands and the perception of titheable matters in the chapelry of *Sowerby*, the particulars of which they stated in schedules, but they denied the title of the plaintiff to the tithes of any of such titheable matters. The defendants then stated, that, towards the latter end of the last century, the then lessees of the impropriate rectory of *Thirsk* alleged that they were entitled, in right of the said impropriate rectory, to the tithes of wool and lamb in the said township of *Sowerby*, and by intimidation or misrepresentation gradually induced many, if not all, of the occupiers of lands in the said township to pay the tithes of wool and lamb, or some composition for the same, to the said lessees or farmers of the said rectory; and such occupiers, for many years during the latter end of the last century and the beginning of the present, paid such tithes to the said lessees or farmers of the said impropriate rectory in ignorance that such lessees had no right or title thereto; but such tithes, so far at least as respected the said township of *Sowerby*, had not been paid to such lessees for some number of years past, in consequence of the occupiers of lands in the said township of *Sowerby* having discovered that the lessees of the said impropriate rectory, and those under whom they claimed, had no right or title thereto, but that all the lands in the said township of *Sowerby* were lawfully exempted, exonerated, and discharged from payment of the said tithes of wool and

lamb, and all other tithes whatsoever. The defendants stated that the parsonage of *Thirsk*, was originally founded and appropriated by *Roger de Mowbray* to the monastery of *Newburgh*, in the county of *York*, before the statutes 15 *Rich. 2*, and 4 *Hen. 4*, which expressly required, that, on appropriations of benefices after those statutes, vicars should be created and endowed. That no vicar was ever lawfully created or endowed within the said impropriate rectory or parsonage of *Thirsk*, and consequently that there could not be the three parochial chapelries and perpetual curacies, for want of union with such a proper ecclesiastical benefice; and because there never had been to such proper ecclesiastical benefice and consolidated mother church, any presentations or collations with the said chapelries annexed. That the said church at *Sowerby*, at its original foundation, was a distinct parish church and free chapel, endowed by the original patron, with an assignment of the tithes of wool, lamb, and other small tithes, and nothing more, within the parish and free chapelry, and that the same so continued at the dissolution of the monasteries. That the impropriate rectory and parsonage of *Thirsk* was formerly part of the possessions of one of the monasteries, and at their dissolution became vested in the crown; and that there then was within the parish and free chapelry of *Sowerby*, belonging to the impropriate rectory of *Thirsk*, the tithes of corn and grain, and also a certain immemorial customary payment of 1*l.* 8*s.*, payable in each year by the then occupier of all the lands of *Sowerby* aforesaid, to the rector of the said impropriate rectory of *Thirsk*, who was then sole proprietor of all the same lands, when demanded, as a modus in lieu of all the tithes of hay grown within the parish and free chapelry; and that there then also was a certain fixed and invariable money payment of 9*l.* 10*s.*, payable in each year, at *Easter*, for offerings, by the said occupier of all the lands of *Sowerby* aforesaid, to

1834.

DENT
v.
ROB.

1834.

DENT
v.
ROB.

the rector of the impropriate rectory of *Thirsk* aforesaid. That King *Henry* 8, as owner and proprietor of all the lands within the said parish and free chapelry, entered into a composition real with the then officiating minister of the said parish and free chapelry, and that it was agreed between King *Henry* 8 and the then officiating minister of the said parish and free chapelry of *Sowerby* aforesaid, with all proper, lawful, and necessary consents, that his said Majesty should and would, and that he did accordingly, grant and convey to the said then officiating minister or chaplain of the parish and free chapelry of *Sowerby* aforesaid, certain lands in *Sowerby* aforesaid, then in the possession of the plaintiff, containing together, by estimation, six acres, more or less, and also the said modus for hay of 1*l.* 8*s.*, and the said certain, fixed, and invariable money payment of 9*l.* 10*s.*, as a composition real and recompense for the discharge, exoneration, and acquittal of all the said lands within the said parish and free chapelry of *Sowerby* aforesaid, from the small tithes and every of them. That the chapel of *Sowerby* aforesaid was, at and long before the time of the reign of King *Henry* 8, a distinct parish church and free chapel, and that the same so continued until the passing of the statute of the first of *Edward* the 6th for their dissolution, and for vesting their possessions in the crown; and the said then free chapel of *Sowerby* aforesaid, together with all its possessions, including the said composition real, became, by virtue of the same statute, absolutely vested in the crown. That the crown some time afterwards created the said free chapel of *Sowerby* aforesaid a lawful vicarage and parish church, and endowed the same with the lands then in the possession of the plaintiff, and also with the said modus for hay of 1*l.* 8*s.*, and the said certain, fixed, and invariable money payment of 9*l.* 10*s.* That, at the time of the creation and endowment of the said vicarage and parish church of *Sowerby* aforesaid, the advowson, presentation, and right

1834.

DENT
v.
ROB.

of patronage of the said parish church was lawfully vested in the crown; and that in a grant from the crown, in the 42nd year of the reign of her late Majesty Queen *Elisabeth*, the advowson, presentation, and right of patronage of and to the said vicarage and parish church of *Sowerby* aforesaid was expressly reserved to the crown. That, as no adverse presentation to the said vicarage against the right of the crown had ever taken place, the right of the crown was still continuing; and that consequently the right of patronage and presentation to the said vicarage and parish church of *Sowerby* aforesaid was in the King; and that, as the said complainant was not presented to the said vicarage and parish church of *Sowerby* by the crown, he was not duly or lawfully presented. That the tithes of corn and grain solely and alone, within the said parish and free chapel of *Sowerby*, belonged to the archbishop of *York*, or those claiming under him, as impropriate rectors of *Thirsk* aforesaid.

The defendants *John Sanders Walton* and *Henry Wickham*, who were trustees under the will of *Matthew Butterwick*, a former lessee of the tithes of the rectory, and to whom, as such trustees, a renewed lease had been granted, by their answer disputed the title of the plaintiff, as curate, to the tithes of wool and lamb, which they alleged had, prior to the year 1821, been received by the impropriate rector or his lessees, though they admitted that, on the last renewal of the lease, the fine was fixed on a valuation of the tithes of corn and grain only. The defendants, *Robert Lascelles*, *John Lascelles*, *Lamplugh Hood*, and *Hannah Frances*, his wife, and *Mary Lascelles*, who were respectively devisees under the will of *Matthew Butterwick*, put in an answer to a similar effect with the answer of the trustees under *Matthew Butterwick's* will.

The evidence on the part of the plaintiff consisted of the ministers' accounts, 30 and 31 *Hen. 8*, 1540, of the possessions of the monastery of *Newburg*; by which, *Thirsk* appeared to be a rectory, and the bailiff accounted "for 6*l*.

1834.

DENT
v.
ROB.

for the farm of one messuage in *Thirsk*, with the tithes, barn, and garden to the same belonging, and with the tithe of grain in *Thirsk*; for the farm of the tithes of grain of the township of *Sowerby*, 6*l.* 13*s.* 4*d.*; the tithes of grain of the township of *Sandhutton*, 4*l.*; and all and all manner of tithes of a field called *Woodhall Field*, 13*s.* 4*d.*; and, among other particulars, for 12*l.* 15*s.*, for the farm of personal tithes, with one messuage and two closes, with four oxgangs of land, then in the tenure of — *Babrygge*, and with all and all manner of oblations, tithes of wool, lamb, geese, hemp, and line, together with all other spiritual profits: those tithes which to other persons are before demised being excepted, and all tithes of wool, lamb, and other small tithes of *Sowerby*, *Sandhutton*, and *Carlton* of old time assigned for the support of two chaplains there celebrating, in like manner excepted.” A grant in the 36 *Hen.* 8, by which the crown granted to the archbishop of *York*, *inter alia*, “the rectory of *Thirsk*, tithes of corn in *Thirsk*, and tithes of corn in *Sowerby*.” A parliamentary survey, dated in 1650, in which, among other profits of the rectory of *Thirsk*, were enumerated the tithes of corn, hay, wool, lamb, *Easter* book, and all small tithes of *Thirsk*, with the tithe, corn, wool, and lamb of *Sowerby*. The survey contained also the following passages: “There are three chapels within the parish of *Thirsk*, viz. *Sowerby*, *Carleton*, and *Sandhutton*; the curates have small tithes for their pains, which are worth 10*s.* a piece *per annum*.” “The small garthes and backsides of *Sowerby*, *Carleton*, and *Sandhutton*, being sown with hemp, line, or corn, pay tithe to the curate of *Sowerby*, and also one close called *Priest* close.” The plaintiff also proved books of acts of the archbishop of *York*, from the archbishop’s registry, commencing in 1676, and continued to the present time, containing the admissions and licenses of the curates, including the plaintiff, to serve the cure of souls in the chapelry of *Sowerby*:—various register books of the chapelry of *Sowerby*, containing entries of baptisms, mar-

1834.

DENT

v.

ROB.

riages, and burials, for a great number of years, signed by the curates for the time being; various terriers, stating the curate to be entitled to tithes, and moduses for tithes, and some old tithing books. The plaintiff also proved, by parol testimony, that he had officiated in the cure, as also the render of small tithes by some of the inhabitants of *Sowerby*.

The defendants gave in evidence Pope *Nicholas*' taxation, by which the rectory of *Thirsk* was valued at fifty-five marks, or 36*l.* 13*s.* 4*d.* The following extract from the *Nonæ Rolls*, 14 *Edw.* 3, 1340:—"The account of the prior of *Newburgh*, *William de Popelton*, and *William de Scorneton*, assessors, venditors, and collectors of ninths and fifteenths granted to the King, *Edw.* 3, in the fourth year, in the parts of the North Riding, in the county of *York*, for the first year of the payments of the same ninths and fifteenths. The ninth of the sheaves, fleeces, and lambs, by inquisition made of the true value of the same ninth, according to the tenor of the third commission directed to the assessors in the deanery of *Bulmere, Thirsk*, taxed, by Pope *Nicholas*' survey, at 36*l.* 13*s.* 4*d.* The same assessors answer for 20*l.* of the ninth of the same parish, committed to *John Calneton*, *John Schate*, *Adam de Tanfield*, *Stephen de Sutton*, *John Fitzwilliam*, and *Peter de Calneton*, whereof 3*s.* 6*d.* is for portion of the abbot of *Byland*, arising from his temporalities in the same parish, by the assessment of the men aforesaid, and so there is less than the tax by 16*l.* 13*s.* 4*d.*, because the glebe of the church and the tithe of hay are worth 10*l.* The obventions, oblations, mortuaries, and other small tithes, are worth 10*l.*; and where the rector was accustomed to receive by the year to the value of 10*l.*, in this year he hath not received beyond two marks, as it is found by the oath of the men aforesaid—sum 20*l.*" The defendants also proved a Return of the names of the incumbents in the diocese of *York*, and their benefices, returned by the archbishop of *York* in 1536, and presented in the *First Fruits* Office, which mentioned a chaplain of the free chapel

1834.

DENT
v.
ROB.

of *Thirsk*, and two chantry priests at *Thirsk*, but did not mention *Sowerby*, or that there was any chaplain or curate there. The defendants also gave in evidence a return to the commissioners of Queen *Anne's* bounty in 1763, in which *Sowerby* was described as a curacy or donative, and held under the archbishop of *York*, exempt from all ecclesiastical jurisdiction, and in which it was said to be in the parish of *Thirsk*; and it was stated that the township of *Sowerby* paid a small share to several repairs and lasting improvements of *Thirsk* church, but otherwise *Sowerby* was a distinct parish of itself, and did not belong to, and was not annexed to or united with any other parish; and that the improved yearly value of the curacy of *Sowerby* then amounted to 14*l.* a year, arising from three or four acres of glebe land, some small moduses for tithe hay, for small tithes and dues, and *Easter* offerings, which had been paid time out of mind. And a similar report in the year 1792, which was to the like effect, except that the annual income was there stated to amount to 26*l.* a year. The defendants also proved a lease, dated the 6th *June*, 1718, from the then archbishop of *York* to *Matthew Butterwick*, of the rectory of *Thirsk*, in which the lessee covenanted, during the time thereby granted, at his own costs and charges, to provide, find, and keep so many efficient, able, and orderly allowed ministers to say divine service, and administer the sacraments to the parishioners within the chapelries of *Sowerby*, *Carlton*, and *Sandhutton*, belonging to the parish church of *Thirsk*, as had been accustomed to be found, kept, or allowed, by the farmer or lessee of the said rectory, and thereof should acquit and discharge the archbishop. The defendants also proved that a parcel of land, mentioned in some of the ancient documents, was in the possession of the plaintiff, as curate.

Mr. *Boteler*, and Mr. *Monro*, for the plaintiff.—The Parliamentary Survey of 1650 contains a statement of what the parsonage then consisted, and what was payable

1834.

DENT
v.
ROB.

to the curate. This also agrees with the grant and the Ministers' accounts. The Parliamentary Survey mentions the three chapelries of *Sowerby*, *Sandhutton*, and *Carlton*; and it states that the curates have some tithes in the parish which are worth *per annum* at least 10*l*. The Parliamentary Survey contains a distinct recognition of the rights of the curates. By small tithes, it is evident must be intended the other small tithes except wool and lamb. The nomination, admission, and licensing of curates from 1676 to the present time is distinctly proved, the admission being throughout, in general terms, admitted and licensed. They omit the statement that the right of nomination belonged to the archbishop of *York*. An officer of the archbishop's court proves that no earlier entries are to be found. The terriers signed by some of the defendants themselves shew that if the tithes of grain and wool and lamb be put out of the question, the curate is entitled to all the other tithes. The tithing books also shew this. It may be said that the terriers prove that moduses were payable in respect of the tithes; it will, however, be found that there are many variations in the payments. A bad modus may be good evidence of a right to tithe in kind. *Travis v. Oxton* (a), *Blackburn v. Jepson* (b).

On the part of the defendant *Eeles*, it was objected that the curate could not be entitled to tithes, inasmuch as there was no mother church, and there was not any collation, institution, or induction, the curate being only admitted and licensed. That a perpetual curacy depended on the principle of a lawful union having formerly taken place with the mother church. That in *Macgill v. Le Strange* (c), a spiritual rectory was usurped by a layman,

(a) 3 Wood. 523; Eyres, MSS.
7 Bro. P. C. 49; Lord Red. MSS.
3 Eagle & Younge, 1248.

(b) 17 Ves. 473; 3 Swinb. 132;
3 Eagle & Younge, 588.

(c) 2 Eagle & Younge, 115.

1834.

DENT
v.
ROB.

by whom and his family the tithes were received for upwards of a century, without any rector being appointed; the small tithes, during the whole of that period, being paid to the vicar of an adjoining parish; but this was not considered sufficient evidence of a union of the rectory with the adjoining parish. That there was no ground for treating the chapelry as a perpetual curacy, and, even if it were a perpetual curacy, then *Thirsk* must be a vicarage; and it appeared to have been formerly part of *Thirsk*, and was treated as such in the Report to the governors of Queen *Anne's* bounty. That the early leases granted by the archbishop of *York* shewed that the lay impropriator, or his lessee, was bound to provide for the chaplain, and that the archbishop had no right of patronage. That, supposing the fact that it was a perpetual curacy to be established, then there had been a composition real, in which lands, now in the possession of the curate, had been allotted to him. In support of this argument were cited the *Attorney-General v. Brereton* (a), *Britton v. Ward* (b), and *Boulton v. Richards* (c).

Mr. *Spence*, for the defendants *Rob* and *Buckle*.—The plaintiff has produced a terrier of 1716, with a view of proving his title to the tithes, but it proves that moduses were paid. Where a plaintiff, claiming tithes in kind, proves a modus, he cannot have a decree for an account. *Scott v. Fenwick* (d). Two observations arise on the terriers: first, whether they are evidence of constant usage; and, secondly, whether an endowment can be presumed from such evidence of usage. The terrier of 1743

(a) 2 Ves. sen. 425.

(b) Palm. 113; Turn. MS. Rep. 37; Cro. Jac. 515; 2 Ro. 97, 127; Winch. 70; Anon. in Poph. 144; 1 Eagle & Younge, 298.

(c) 6 Price, 483; 3 Eagle & Younge, 948; 9 Price, 671; 3 Eagle & Younge, 1068.

(d) 3 Eagle & Younge, 1318; Gwill. 1250.

1834.

DENT
v.
ROB.

gives the curate all small tithes except wool and lambs. It appears from the Ministers' Accounts that wool and lamb were given to the vicar. The next terrier, in 1764, shews that wool and lamb no longer belong to the vicar or curate. Now, if the curacy had been endowed with these tithes, it is not at all probable that, in the interval, the curate should have lost them. The reason clearly was, that the tithes having considerably increased in value, whilst the rector only continued bound to pay the curate 10*l.* a year, the rector took the tithes of wool and lamb, and left the curate the remainder. This is quite consistent with the case made by the defendants, that the rector is bound to assign sufficient provision for the curate, though they were incorrect, when they supposed that he had been endowed with these tithes. The evidence clearly establishes the moduses. In order to support farm moduses, the antiquity of the farms must be proved. This the defendants are at present not in a situation to do; and the defendants therefore only rely on the modus of one penny an acre for the meadow lands belonging to the township of *Sowerby*, other than those lands which are subject to any particular modus. In the terrier of 1777 the modus of one penny an acre for meadow lands is clearly recognised. In the terrier of 1764 it is not mentioned. The one penny an acre for meadows has been continued down to the present time, with only some slight variations in the description of the meadows. One of the witnesses for the plaintiff proves that he himself paid this modus of one penny an acre for the lands which he held, being grazing or meadow lands. The plaintiff cannot obtain any decree for hay, not having proved any perception, either by the documentary evidence or the parol testimony. There is no evidence of an endowment; and the evidence of the defendants shews that the usage and the ancient documents are inconsistent with any perception in favour of the plaintiff. It is clear from

1834.

DENT
v.
ROB.

the ancient documents, that, up to the 14th *Edw.* 3, the rector was in possession of all the tithes, great and small.

Mr. *Griffith Richards*, for the defendants, the devisees of *Matthew Butterwick*.

Mr. *Forster*, for the other defendants, except the defendant *Eeles*.

Mr. *Boteler*, in reply.—The only inference which can be drawn from Pope *Nicholas*' Taxation, and the *Nonæ Rolls*, is, that there was not then a vicarage regularly endowed. It frequently happened that a monk supplied the cure from the monastery, and so it might have continued down to the dissolution of the monasteries. It is clear that at that time there was a chaplain of *Thirsk*, and two chantry priests—and there is no reason why the chaplain of *Thirsk* and the two chantry priests should not be the persons mentioned in the Ecclesiastical Survey. It is sufficient to say that, for two centuries, the benefice has assumed the rights of a perpetual curacy, and all the benefits annexed to such. The Parliamentary Survey recognises the existence of three chaplains. The parochial registry of *Sowerby*, carried back to the time of Queen *Elizabeth*, shews baptisms, marriages, and burials, signed by the curates from that time to the present. The curates are found, from the bishops' books, to have been regularly nominated and licensed. It has been argued that there is a discrepancy in the documents as to the right to the tithes. It appears that tithes of lamb and wool originally belonged to the chaplains, and that they now do not. The Ecclesiastical Survey gives the value of the corn tithes, the tithes of wool and lamb, Lent tithes, oblations, and the small tithes received at *Easter* time, at 35*l.* The small tithes referred to arise in the township of *Thirsk*, which have never been demanded by the curate, and are precisely the same as those mentioned in the grant from Queen *Elizabeth*. The Parliamentary Survey assigns to the

rector tithes of wool and lamb in *Sowerby*, and to the three chaplains the other small tithes. The terriers appear to be signed by the curate, chapel wardens, and several inhabitants, and they all purport to give an account, not of what the curate received, but to give an account of the houses, glebe land, and buildings belonging to the chapelry. The evidence is all one way. The curate has given sufficient evidence of enjoyment of all small tithes except wool and lamb. It is clear that his general title is made out; and the only question is, whether, as to particular parts, that general title has failed. The constant receipt by him of the tithes of articles of modern introduction shews his general title. With respect to tithe of hay, the early terriers mention a modus of 1s. 4d. for a farm, of which there are twenty in the township. This is bad on the face of it. *Travis v. Oxton* (a), *Blackburn v. Japson* (b). The modus of one penny an acre for meadows lying in the open fields applies only to a particular description of lands, and the defendants have not proved that they held any lands of the particular description.

1834.

DENT
v.
ROB.

Cur. adv. vult.

ALDERSON, B.—This was a bill filed by the plaintiff, as curate of the township of *Sowerby*, in the parish of *Thirsk*, claiming the tithe of hay, and also all small tithes, within that township; and an account of such tithes against such of the present defendants as are occupiers of lands within that district. The plaintiff has also made the archbishop of *York*, the owner of the impropriate rectory, and the defendants, *Rob, Buckle, R. Lascelles, J. Lascelles, H. Lascelles, Hird*, and his wife, who are the lessees and assignees of the lease of the tithes under the archbishop, parties to the bill. The archbishop, by his answer, admits the plain-

June 27th.

(a) 3 Wood, 523; Eyre's MSS.; (b) 17 Ves. 473; 3 Swinb. 132; 7 Bro. P. C. 49; Lord Red. 3 Eagle & Younge, 588. MSS.; 3 Eagle & Younge, 1248.

1834.

DENT

v.

ROB.

tiff's right, claiming only for himself the tithes of corn and grain within the district; the defendants *Rob* and *Buckle* claim, as lessees of the archbishop, the tithes of corn and grain, wool and lamb; and, by their answer, being also occupiers of land within *Sowerby*, deny the plaintiff's right, as curate, to the tithes claimed by him. The other lessees disclaim altogether. The remaining defendants deny the right of the plaintiff, as curate, to the tithes claimed; and also set up, as a defence, an exemption by composition real.

The case on the part of the plaintiff purports to be founded on prescription. He contends that, from time immemorial, the township or district of *Sowerby* has been separated by known boundaries from the rest of the parish of *Thirsk*, and that there has from all time been a parochial chapel therein; and that the curate of such chapel has, by prescription, existed as an endowed curate, having a right, by his endowment, to certain tithes, immemorially assigned to him. It has always appeared to me most important, for the general good of society and the preservation of the equal rights of all, to give to long and uninterrupted usage and enjoyment the greatest weight and force. I adopt the language and sentiment of Lord *Coke*, who says, "God forbid that ancient grants and acts should be drawn in question, although that all things cannot be shewed which at first were necessary to the perfecting of them." (a) In considering this case, I shall reverse the order of time, and, beginning from the modern usage, trace it back to more remote periods. If this usage be consistent, I ought to infer that it has so existed from time immemorial; and then, if there be any supposed state of facts upon which the plaintiff's claim can rest, as a legal one, I am bound, by the principle which I propose to take for my guide, to decree in his favour. Now I am not aware that there is any thing illegal in the supposition that, in times of remote antiquity, this chapel and cha-

(a) *Bird and Wingfield's case*, 12 Co. 5.

pelry may have existed, and that the rector of this parish, with the consent of the patron and ordinary, and, if necessary, with the assent of the King also, as supreme ordinary, may have assigned to the curate or chaplain of the chapel of this district of his parish a portion of tithes as an endowment: in that case, the rector would probably have the patronage of the curacy upon each successive vacancy. Other modes, in which such a claim may have originated, may perhaps be pointed out; if it can in any way have had a legal origin, it is sufficient for this purpose.

I proceed, then, to examine the evidence. In the first place, as to the district itself. On this point the evidence seems to me uniform and uncontradicted; that *Sowerby*, as far back as human testimony or documents can go, has been a district separate from the parish at large. The chapel seems to have immemorially existed as a parochial chapel; there having been exercised in it, as appears from old registers produced in evidence, the rites of baptism, marriage, and sepulture, certainly as far back as 10 *Eliz.*—in fact, as far back as any register can be found to exist. *Sowerby* is also apparently spoken of as a separate district in the Parliamentary Survey in 1650, and in the Ministers' Accounts, 31 *H.* 8, and as an ancient one; for, in the latter of these documents, the Ministers' Accounts, two chaplains are mentioned as celebrating divine service there, and as having had an assignment of tithes "of old time." If it rested here, what other reasonable inference could be drawn from the evidence than that this was a separate district from time immemorial? This part of the case is also materially confirmed by the next head of the plaintiff's evidence. We have appointments to this curacy, beginning with that of the plaintiff in 1827, and going back probably to the time of the dissolution of the monasteries; for this right of appointment has been uniformly exercised by the archbishops of *York*, who were the original grantees of the rectory of *Thirsk* under the crown at the period of the dissolution. And in the

1834.

DENT
v.
ROB.

1834.

DENT
v.
ROB.

account of the possessions of the monastery, from whom the archbishops derived this property, we further find mention made of two chaplains, to whom the small tithes of *Sowerby*, *Sandhutton*, and *Carlton* had then been of old assigned. And again, in the Parliamentary Survey of 1650, express mention is made of the three curates of *Sowerby*, *Sandhutton*, and *Carlton*, and of their endowment with the small tithes of their districts; and, in addition, that the curate of *Sowerby* had other portions even of the great tithes in particular fields there situate. Even the document put in by the defendants, the report to the governors of Queen *Anne's* bounty, though not entitled to much weight, confirms this part of the case, by treating the endowment of this curacy as an endowment of right belonging to the benefice, and therefore as being admitted to be an ancient one. Now, what is there to be set against all this body of evidence? There is first produced the taxation of Pope *Nicholas*, *A.D.* 1291, and secondly the *Nonæ Roll*, *A.D.* 1340. These documents are wholly silent on the subject. They do not contain any affirmative statement inconsistent with the previous evidence, but are merely negative evidence, the weight of which depends on our estimate of the accuracy of commissioners of inquiry in very remote times; as to whose means of information, and capacity and disposition to acquire it, we can only form a conjecture. The same observation applies to the next document, the Ecclesiastical Survey, 26 *Hen.* 8, which omits any mention of these chaplains and districts within *Thirsk*. As to the return of beneficed clergy made in the following year, 1536, by the archbishop of *York*, I am not at all satisfied that there is any omission in that document; for I find in it mention made of the chaplain of the free chapel of *Thirsk*, and of two chantry priests at *Thirsk* also, who are all included in the list of the beneficed clergy by the archbishop. But, even if it were so, and if these documents were at variance with the affirmative testimony of the almost contemporary Ministers' Accounts in the 31

Hen. 8, still I think we must resort to the subsequent usage, which in this case, as far as the evidence goes, is uniform. The same observation will also apply to the discrepancy which has been very properly pointed out as existing as to the number and description of the curates in the Ministers' Accounts and in the Parliamentary Survey. These discrepancies are constantly found in such documents. Usage is the best guide in such cases; for the rights of men should not rest on conjecture alone, but on the rational presumption that what has in fact existed long, has existed by right, unless the contrary be clearly shewn.

But then it is argued, that there are other facts which are admitted now to exist, and which are quite inconsistent with the above conclusion. One of these admitted facts is, that parishioners dwelling within *Sowerby* contribute to the repairs of the church of *Thirsk*; and it is urged, that, according to the case of the *Attorney-General v. Brereton* (a), this circumstance shews that the chapel of *Sowerby* must be considered as a chapel of ease to the inhabitants of *Thirsk*. But I apprehend this is not so. The contribution to such repairs is a circumstance conducing to such a conclusion, and, if standing alone, or confirmed by others, would have great weight. But the other facts here seem to me to shew the contrary. The right of baptism and sepulture, the endowment with tithes, and the other circumstances of this case, lead me to an opposite conclusion. Then again it is urged, that there cannot be these parochial chapels, because the case I have just mentioned shews that such can only exist where there has been a union of parishes; and that there is no such union here; because there is no vicarage or mother church with which these can be supposed to have been anciently united. But this is by no means a proper inference to draw from that authority. In that case the Lord Chancellor pointed out various circumstances, which

1834.

DENT
v.
ROB.

(a) 2 Ves. sen. 427.

1834.

DENT
v.
ROB.

shewed that the chapel of *Flint* was not a mere chapel of ease. He observed, that it was an immemorial chapel, that it belonged to a country town, that it was endowed, that public worship was there celebrated, and that the rites of baptism, marriage, and sepulture (particularly the latter) were there exercised—the criteria he mainly relied upon; and they all exist in the present case. But there it also appeared, that the presentations to the vicarage of *Northop* had always been “*cum capella annexa*,” which seemed to require some explanation, and to rebut the presumption of *Flint* being itself part of *Northop*. In order to explain how this might be, the Lord Chancellor adverted to the probability of an ancient union of the parishes of *Northop* and *Flint*, and pointed out the exemption from contribution to the repairs of the parish church of *Northop*, as leading strongly to that conclusion; but I do not find it laid down there or any where else, that there can be no such parochial chapel, unless there has been a union of that description. The circumstance that there is no vicarage is obviously accounted for by the fact, that the conveyance to the monastery of *Newburgh* was by *Roger de Mowbray* prior to the statutes 15 *Rich.* 2 and 4 *Hen.* 4, as is indeed stated in the defendants’ answer. As to the conveyances, I shall not advert to them, for they appear to me to have no material bearing on the case. If they even included these tithes, which I doubt, they would be utterly inconsistent with an enjoyment of nearly two centuries. Neither do I think that much weight ought to be given to the covenants in the archbishop’s leases, of his tithes of the rectory of *Thirsk*; for the covenant aptly applies to the supply of a curate to the parish church of *Thirsk* itself; and to construe it in any other way, would be at variance with the other circumstances of this case.

Upon the whole, then, I think the plaintiff’s title is sufficiently made out; and that I ought, on the evidence before me, to come to the conclusion, that he is legally

nominated and licensed as curate of the chapelry of *Sowerby*, that such chapel and chapelry have existed from time immemorial, and that he and his predecessors, curates of that chapel, have lawfully been endowed with some tithes by prescription.

The next question is the extent of such endowment. This question must also depend upon the usage which has prevailed within the district. There is no doubt that the endowment may have been of the whole, or of any portion of tithes, or of the moduses, if any there be, lawfully existing in lieu of the tithes, or of any portion of them. The general evidence here is tolerably clear, I think, as to the extent of the endowment. There is no proof of the receipt of the tithes of wool and lamb; and therefore, although the language of the Ministers' Accounts, and of the Parliamentary Survey, and of some other ancient documents is general in its terms; yet, construing them, as all such documents ought to be, with the light thrown upon documentary evidence by contemporary and modern usage, I think the plaintiff's counsel have judged wisely in not attempting to claim tithe of wool and lamb, although not claimed by the archbishop. It is clear that the right to the enjoyment of these tithes is, at the expiration of the present lease to *Rob* and *Buckle*, in the see of *York*. If the archbishop chooses, he may then endow the curacy of *Sowerby* with these tithes, which he seems erroneously to suppose has been done already. With this exception, the right to all small tithes in *Sowerby* seems fully made out. There is one strong circumstance, which I think very satisfactorily demonstrates the extent of the endowment: I allude to the admitted fact, that the curate has taken tithes of articles which have not been cultivated immemorially within this kingdom. His right to these new articles could only have arisen from a general endowment of all small tithes, with the particular exception of wool and lamb. But though his endowment had been thus in general terms, still it would not be at all inconsistent with a

1834.

DENT
v.
ROB.

1834.

DENT
v.
ROB.

well established *modus* or *moduses* for any particular articles. On this head the *terriers* are to be adverted to; but after examining them, it does not appear to me that there is any uniform payment to be found, except $1\frac{1}{2}d.$ for a renewed cow, and $1d.$ for other cows. Now the plaintiff is willing to allow these payments as a *modus* for tithe milk; and therefore there seems to be no objection to my allowing it also, it being understood that by a renewed cow is meant a milch cow having had a calf within the year, for which $1\frac{1}{2}d.$ is to be paid, and that the $1d.$ is to be paid for a cow which has not had a calf within that period.

There remains only the question as to the tithe of hay. This also, although not a small tithe, is claimed by the curate. It is very material to be observed, that no one else claims it, although it must be payable to some one, either in kind or under the form of a *modus*. The evidence by which the curate contends for it, is that of usage. He produces a long series of *terriers*, in all of which hay is mentioned. But, at the same time, it is to be observed that it is mentioned in conjunction with a claim of *modus* in respect of it. If I could have found in these documents any consistent or even prevalent usage as to a *modus* for hay, I should have been disposed to give great weight to the claim; but I cannot find any such usage: the whole is a mass of confusion on this subject. But one conclusion seems fairly to arise from these *terriers*, which go back as far as 1716, *viz.*, that the right to the tithe of hay, either in kind or under a *modus*, belongs to the curate. There is only one circumstance in opposition to this, *viz.*, the omission of any mention of hay in the ancient documents which speak of the endowment of the curates. If the contest had been between the archbishop or his lessees and the present curate, I should have paused as to the conclusion. But when I find them making no claim, and that, unless due and payable to the curate, hay tithe would be without any claimant, I think the usage ought clearly to prevail, and that I ought to consi-

der the curate as endowed with the tithe of hay in kind ; or, if the *modus* exist, with a *modus* in lieu thereof. Now the varying, uncertain, and confused payments under the name of a *modus* must, I think, according to reason and authority, be treated as compositions for tithe hay, and not as *moduses* ; and the result of the evidence will then be, that the curate must be taken to have received, from time to time, compositions for hay—in other words, tithe in kind of hay ; and this evidence is sufficient to establish the extent of his original endowment, as including hay also. The receipt of clover tithe in kind, which is proved by the former curate's books, is strongly confirmatory of the right now claimed. On the whole, then, I come to the conclusion, that the curate's endowment must be taken upon this evidence to include the tithe of hay in kind, and all small tithes except wool and lamb, subject, however, to a *modus* in respect of tithe milk. This brings me to the last point made by the defendant Mr. *Eeles*, *viz.* that there has been a composition real. I shall not dwell long on this point, because, after much consideration, I really cannot find any evidence on which such a defence can rest, amounting even to a probable conjecture. It may be admitted, and the law certainly is so, that it is not necessary to produce the deed of composition in order to support this defence ; but reasonable evidence must be given to make it probable that there was such a deed. The coincidence as to the possession of a piece of land by the curate, with some land mentioned or alluded to in some of the older documents, would, if made out, which I think it is not, be but a slender foundation for such a superstructure. I can see no ground for this defence.

Upon the whole, I come to the conclusion, that as against *Rob*, *Buckle*, and the other occupiers, the plaintiff is entitled to a decree for an account of all small tithes except wool and lamb, and of the tithe of hay, establishing, however, their claim to the *modus* in respect of tithe

1834.

DENT
v.
ROB.

1834.

DENT
v.
ROB.

milk, unless the plaintiff elects to have an issue on that point; and this decree must be with costs. As to the archbishop and the other lessees, except *Rob* and *Buckle*, I think the plaintiff must pay the costs of bringing them before the Court. As to *Rob* and *Buckle*, they are to have the costs arising out of the claim of wool and lamb, and the claim of milk in kind (a).

(a) Considerable discussion took place as to the costs of the suit, the defendants *Rob* and *Buckle* claiming to be allowed the costs occasioned by the plaintiff's having claimed in his original bill tithes of wool and lamb, which on amendment he had struck out; and also the additional costs occasioned by several of the witnesses having proved, not only documents, but also the effect of those documents. For the plaintiff it was contended, that the de-

fendants had been allowed the usual costs of the amendment, which was the whole that they were entitled to, according to the practice of the Court. And as to the costs of the evidence, it was urged that the costs of dissecting the evidence would exceed the amount of the costs objected to. The Court expressed an opinion that the Master, in taxing the costs, should make proper allowances to the defendants in these respects.

MARY SLATTER, widow—Plaintiff;

GEORGE SLATTER the elder, CHARLES DRUCE the younger,
JOHN DRUCE, GEORGE NUGENT, and the GOVERNOR
and COMPANY of the Bank of ENGLAND, Defendants.

June 7th.

Husband and
wife having
agreed to live
apart from each
other, a sum of

IN *August*, 1820, *John Slatter*, deceased, and the plaintiff, were married. In and prior to the year 1826, *John* stock was invested in the name of trustees, and, by a separation deed, containing the usual provisions, the husband agreed to pay to his wife, for her maintenance, an annuity of 180*l.* a-year, and it was declared that the stock was intended as a security for the payment of that annuity. The deed contained a proviso that the husband should be indemnified out of the annuity against the debts and contracts of his wife, and all dower and thirds at common law or by custom, which she, at any time thereafter, might claim, challenge, or demand from, out of, or against her husband, or his present or future estate, real or personal; and an agreement that the wife should make and execute all such acts, deeds, and matters as should be requisite for the purpose of releasing, barring, or extinguishing all dower or thirds at the common law, or by custom, which she could or might claim or demand in, to, or out of any real or personal estate of her husband. The husband afterwards dying intestate, it was *held*, that the deed did not deprive the wife of her share of her husband's personal estate, under the Statute of Distributions.

Slatter had become addicted to habits of intoxication and intemperance, which rendered a separation between him and his wife necessary. By a deed of separation, dated the 14th *January*, 1831, and made between *John Slatter*, of the first part, the plaintiff, his wife, of the second part, and *Charles Druce* the younger, *John Druce*, and *George Nugent*, of the third part, after stating that differences had arisen between *Slatter* and his wife, and that they had agreed to live apart from each other, and that for the purpose of making a provision for her support and maintenance during her life, but subject to the proviso thereafter contained, *John Slatter* had agreed to allow her an annuity of 180*l.* a year, to be secured by the transfer of 6000*l.* Consols into the joint names of *John Slatter* and of trustees (the parties of the third part). *Slatter* covenanted and agreed with the trustees and with his wife, that it should be lawful for her, and that he would permit and suffer her, at all times during their joint lives, to live separate and apart from him; and that he would not at any time thereafter have, claim, or demand any of her property, real or personal estate, whatsoever; and that the plaintiff might enjoy the same, and make such disposition thereof as if she were a feme sole and unmarried, and that the same should not be subject or liable to the debts, engagements, incumbrances, power, intermeddling, or control of him the said *John Slatter*; that he, the said *John Slatter*, would, from time to time, (subject, nevertheless, to the proviso thereafter contained), pay to the plaintiff and her assigns, for the term of her life, an annuity or yearly sum of 180*l.*, for her support and maintenance, by equal half-yearly portions; provided always, and it was thereby agreed, by and between all the parties to those presents, that the said *John Slatter*, his executors and administrators, should be indemnified and reimbursed by and out of the said annuity or yearly sum of 180*l.*, from the payment of all debts, of what nature or kind soever,

1834.

SLATTER
v.
SLATTER.

1834.
 SLATTER
 v.
 SLATTER.

which the plaintiff should thereafter during her life contract or make with any person or persons whomsoever; and also of and from all alimony or maintenance whatsoever (except the aforesaid annuity or yearly sum of 180*l.*), and all dower or thirds, either at common law or by custom, which she, at any time thereafter, might claim, challenge, or demand from, out of, upon, or against the said *John Slatter*, or his present or future estate, real or personal. The settlement then contained provisions against the plaintiff's molesting *John Slatter*, or compelling him to live with her, and an agreement on her part to make and execute all such acts, assurances, matters, and things whatsoever as should be requisite or expedient for the purposes of releasing, barring, extinguishing, and destroying all dower or thirds, or right or title to dower or thirds, at the common law or by custom, which she could or might claim or demand in, to, or out of any real or personal estate or effects of or belonging to, or to belong to the said *John Slatter*. And it was agreed that the 6000*l.* three per cent. Consolidated Annuities, transferred into the names of the said trustees, were so transferred, and that they should stand possessed thereof, in trust for the further and better securing the said annuity or yearly sum of 180*l.*; but subject, nevertheless, to the proviso thereinbefore contained.

John Slatter died in *October*, 1832, intestate, and without issue, leaving the plaintiff, his widow, and the defendant, *George Slatter* the elder, his father and next of kin; and, after *John Slatter's* death, administration to his estate was granted to *George Slatter* the elder.

John Slatter, at the time of his death, was a freeman of the city of *London*, and was possessed of considerable real and personal estate.

The bill was filed by the widow of *John Slatter* against the administrator, *George Slatter*, the trustees of the deed of separation, and the Governor and Company of the Bank of *England*. The plaintiff, by her bill, claimed to be entitled to elect, when the residue of *John Slatter's* perso-

1834.

SLATTER
v.
SLATTER.

nal estate should have been ascertained, whether she would take the provision made by the deed of separation, or the value or amount of her widow's chamber, and her three equal fourth parts of the clear residue of the personal estate, being the share to which she was entitled by virtue of the custom of the city of *London*. The bill, after stating the agreement to live separate, and the deed of separation, charged that she was not bound by the provisions of the deed, and that she was not deprived or excluded from her legal rights to a share of the personal estate of the said *John Slatter*. That though by the deed an attempt was made to bar or deprive her of her rights and interests in the personal estate of *John Slatter*, either by the common law or by custom, yet that no reference or allusion was made to her distributive share as the widow of *John Slatter*, under the statute made for the distribution of intestates' estates; and that, therefore, if she were in fact bound or affected by the deed, and was thereby deprived of her share of his personal estate by the common law or by custom, yet she was not in any manner deprived of her share thereof under the statute. The bill further charged, that if the deed were, in fact, ever binding on the plaintiff, yet that such deed was, subsequently to the execution thereof, rendered wholly null and void, excepting so far as the annuity was secured thereby, by the subsequent cohabitation of *John Slatter* and the plaintiff. That in *June*, 1831, *John Slatter* proposed to the plaintiff that they should again live together, to which proposal the plaintiff acceded; and with a view to such arrangement, *John Slatter* gave instructions to two of the trustees named in the deed of separation to prepare a deed or instrument for determining and putting an end to the said separation, and the deed of separation; but, nevertheless, for continuing the payment of the said annuity or yearly sum of 180*l.* to the plaintiff. And that, in pursuance of such directions, a deed was prepared, and was perused and approved by *John Slatter*, and was after-

1834.
SLATTER
v.
SLATTER.

wards, by his direction, engrossed and indorsed on the deed of separation, but was not executed by him, by reason of his irregular habits, though the plaintiff received the annuity down to *July*, 1832, just before the death of the intestate. The bill prayed the usual accounts of the personal estate of *John Slatter*; a declaration that the plaintiff was not bound by the deed of separation, or thereby in any manner bound or deprived of any of her legal rights as the widow of *John Slatter*, and that she was at liberty to elect to take under that deed, or to reject the same, after the amount of *John Slatter's* personal estate should have been ascertained; and that, in case she should elect to insist on her legal rights as the widow of *John Slatter*, then that the defendant *George Slatter* the elder might be decreed to pay to her the value of her widow's chamber, and that three equal fourth parts of the clear residue of *John Slatter's* estate might also be paid to her.

The defendant *George Slatter* the elder, by his answer, insisted on the deed of separation, and on the provision thereby made for the plaintiff, in bar of any claim which she might have in or to the estate and effects of the intestate; and he denied that any reconciliation or subsequent cohabitation had taken place between the plaintiff and her late husband.

The defendants, the trustees, and the Governor and Company of the Bank of *England*, put in formal answers.

Evidence was entered into on both sides. On the part of the plaintiff, it was proved by the testimony of two witnesses, that *John Slatter*, subsequently to the deed of separation, had gone to his wife at *Gravesend*, where she resided, and on two or three occasions had slept with her at her lodgings. The general habits of intoxication and intemperance of *John Slatter* were also proved, as also his desire when sober to be reconciled to his wife, and that she should live with him, and that he continually made pre-

sents to her. Some evidence was also given, that, upon the treaty for a reconciliation, it was arranged that the annuity of 180*l.* should be continued to the plaintiff, and that a deed should be prepared for that purpose.

On the part of the defendant *George Slatter* the elder, the defendant *Charles Druce* the younger, one of the trustees in the separation deed and the solicitor by whom it was prepared, was examined: the material effect of whose testimony was, that the indorsement on the deed of separation was prepared in consequence of the proposed reconciliation between the parties, the plaintiff declaring that she should not object to return to him, if she could do so without prejudice to her annuity in case of a second separation. That *John Slatter* refused to sign the indorsement, on the ground that he did not approve of the articles. The witness also deposed to the plaintiff's having given him to understand that no cohabitation had taken place between the plaintiff and her husband subsequently to the deed of separation.

Mr. *Spence* and Mr. *Bickner* for the plaintiffs.—The plaintiff is not in any manner bound by the deed of separation. A married woman cannot contract, nor can she bind herself by deed alone, except as to her separate property. *Lord St. John v. Lady St. John* (a). Deeds of separation are contrary to the policy of the law. There is no covenant in the deed of separation in this case, on the part of the trustees, to indemnify the husband; the only indemnity is the trust-fund, out of which the annuity is to be paid to her. In *Stamper v. Barker* (b), the wife, being entitled to a present interest in personal property, and to certain contingent interests, a deed of separation was entered into between herself, her father, and her husband, by which she was to retain her present interest in the property, and the husband was to have a share in

1834.

SLATTER
v.
SLATTER.

(a) 11 Ves. 526, 531.

(b) 5 Madd. 157.

1834.
 SLATTER
 v.
 SLATTER.

the contingent property when it fell into possession; the husband having died before the wife, the deed was treated as a nullity as against the wife, and she was held to take by survivorship. The deed, in the present case, bears internal evidence that it was not considered binding on the wife, the annuity being subjected to make good any debts which she might incur. The wife is incapable by law to bind herself by any deed. Assuming, however, the deed to be valid, it was not intended to deprive her of any of her legal rights, but only to deprive her of the annuity. If the deed had any effect, and was in any manner binding on the wife, then it was avoided by the subsequent reconciliation and cohabitation of the parties, which is clearly established by the evidence (a).

Mr. *Wigram*, and Mr. *James Russell*, for the defendant *George Slatter*.—By this separation deed it is covenanted and agreed by all parties that the plaintiff shall do and execute all such acts and deeds as shall be requisite for releasing, barring, and destroying all dower and thirds at the common law, or by custom, which the plaintiff could or might claim out of the real or personal estates of *John Slatter*; and the trustees covenant to indemnify *John Slatter*. If, therefore, the plaintiff succeed, the defendants the trustees will be liable to indemnify the defendant *Slatter* under that proviso and the covenant for further assurance in the separation deed. If the deed be

(a) See *Bateman v. Countess of Ross*, 1 Dow, P. C. 235; *Hindley v. The Marquis of Westmeath*, 6 Barnew. & Cressw. 200; *The Marquis of Westmeath v. The Marchioness of Westmeath*, 1 Dow & Clark, 519; *Earl of Westmeath v. Countess of Westmeath*, 1 Jac. 126, 140; *Westmeath v. Westmeath*, 2 Hagg. Suppl. 1, 115; *Legard v. Johnson*, 3 Ves. 352, 9; *Elworthy v. Bird*, 2 Sim. & Stuart, 372, 381; *Lord Rodney v. Chambers*, 2 East, 283; *Worrall v. Jacob*, 3 Meriv. 256, 268; *Chambers v. Caulfield*, 6 East, 244; *Durant v. Titley*, 7 Price, 577; *Onslow v. Onslow*, 1 Sim. 18.

declared void, it must be void altogether; and if so, then no case of election can arise. In all the cases which have arisen, the deed has provided for future separation; and the Court has considered such a proviso as against the policy of the law. In *Wilson v. Mushett* (a), it was held that a mere accidental cohabitation did not amount to a condonation. In the present case the evidence, if it actually proves any cohabitation subsequently to the separation deed, shews that such cohabitation was merely accidental, and not from any determination in the parties to live with each other again. In *Lord Westmeath's* case (b), it was proved that the husband and wife had visited many places together, and were frequently alone in rooms together; but, as there was not any evidence of any intended reconciliation, it was held that there was not any condonation. A Court of equity holds a wife bound by her contracts with respect to her separate property, and no substantial reason can be shewn why she should not be considered equally bound in the present case. *Head v. Head* (c), *Guth v. Guth* (d), and *Holt v. Brien* (e), were also cited for the defendant.

1834.

SLATTER
v.
SLATTER.

Mr. *Teed*, for the defendants the trustees.

Mr. *Phillimore*, for the Bank of *England*.

Mr. *Spence*, in reply.—If the defendant *Druce* be liable at all, he can only be liable to reimburse the plaintiff out of the annuity of 180*l.* provided by the separation deed. The plaintiff elects to take all the interest to which she is entitled as the widow of *John Slatter*, and, thus electing, she necessarily repudiates the annuity; so that, in fact, the defendant *Slatter* is indemnified out of the annuity by the plaintiff's not claiming it.

(a) 3 Barnew. & Adol. 743.

(d) 3 Bro. C. C. 614.

(b) 1 Dow & Clark, 519.

(e) 4 Barnew. & Ald. 252.

(c) 3 Atk. 295, 547.

1834.

SLATTER
v.
SLATTER.

The LORD CHIEF BARON, without entering into any detail of the circumstances of the case, expressed his opinion to be that there was nothing in the deed to deprive the wife of any interest to which she was entitled in the personal estate of her late husband.

The decree directed the usual accounts of the personal estate of *John Slatter*, an inquiry whether he was a free-man of the city of *London*, whether any settlement was made on his marriage with the plaintiff, whether any property came to the plaintiff since the date of the separation deed during the coverture, and an inquiry who were the next of kin of *John Slatter* at his decease. The bill was dismissed as against the Bank of *England*, with costs (*a*).

(*a*) At the sittings in London, after Michaelmas Term, 1833, an action for dower, which had been brought by the plaintiff against *George Slatter* the younger, the nephew and heir-at-law of *John Slatter*, was tried before Lord Chief Justice *Tindal*. To that action the defendant pleaded the deed of separation, and an election by the plaintiff to take the annuity in lieu of dower; and the defendant proved a receipt by the plaintiff, after issue joined and before trial, of the dividends of the stock mentioned in the separation deed. A verdict was found for the plaintiff, subject to a case for the opinion of the Court; and, upon the argument of that case before the Court of Common Pleas, in Michaelmas

Term, 1834, it was held that the evidence of the receipt by the plaintiff of the dividends was not sufficient evidence to warrant the Court in holding that the plaintiff had elected to take the annuity in satisfaction of her dower. It was held, also, that an order made in the suit in equity (to which the defendant at law was not a party), by which it was provided that the receipt of the dividends by the plaintiff should be without prejudice to her right to dower, was admissible in evidence to shew *quo animo* she received them. The Court expressed a doubt whether a Court of law could properly take cognizance of an election to take something in lieu of dower. See 5 Moore & Scott, 82.

1834.

SMALL and Others v. ATTWOOD.

May 24th.

MR. Wakefield moved that the books, papers, and writings, mentioned in a schedule annexed to the answer of the defendant, which had been brought into Court, and deposited by the defendant with his clerk in court, pursuant to the usual order obtained for that purpose, might be delivered out to him, the purpose for which they had been so deposited having been answered. In support of the motion, he contended that the Court only required that the books, papers, and writings, should be left with the clerk in court a sufficient time to enable the plaintiffs to inspect them, and, if they thought fit, to take copies; that the books and papers in question had been deposited upwards of seven years, and the plaintiffs had, therefore, had every opportunity of inspection and examination.

Where books, papers, and writings, mentioned in a schedule to the defendant's answer, are deposited by the defendant with his clerk in court for the inspection and examination of the plaintiff, under the usual order for that purpose, the defendant is entitled to have them restored to him so soon as such inspection and examination have taken place; and the plaintiff is not entitled to have them retained in the custody of the clerk in court, notwithstanding it may be necessary that they should be produced before the Master in taking the accounts directed by the decree, or on the hearing of an appeal from the decree.

Mr. Wigram, for the plaintiffs, denied the rule to be such as stated by **Mr. Wakefield**, and contended, that, under the decree directing inquiries as to the mode in which the trade had been carried on, there might be occasion to refer to the books; that copies of them would cost 10,000*l.*; and that no sufficient ground was shewn for returning the books. It was not pretended they were wanted for the purposes of the trade of **Mr. Attwood**. The defendant also sought to impeach the decree, on the ground that the trade was improperly carried on by the plaintiffs. The books would be necessary for the purpose of defending the plaintiffs from this imputation. Another reason why the books should not be produced was, that they would be required on the hearing of the appeal now pending before the House of Lords.

Mr. Wakefield, in reply.—The application is quite of

1834.

SMALL
v.
ATTWOOD.

course, unless some special circumstances can be shewn in opposition to it. The books are brought in for the purpose of inspection by the plaintiffs, who are permitted to take such extracts as may be necessary to be used at the hearing of the cause; and when the parties have had sufficient opportunity for these purposes, no instance can be shewn in which such an application has been refused. It is absolutely necessary that the books should be returned to the defendant for the purposes of the decree. All that the Court can do is to annex a condition to the delivery of the papers, that the party shall produce them at the hearing of the cause. Another reason why they should be delivered back to the defendant is, that they are now in the hands of the clerk in court, and they are required for the purpose of being produced before the Master in the prosecution of the inquiries; but the clerk in court cannot produce them without an order.

The LORD CHIEF BARON.—It appears to me, that when books and papers are brought into Court for the inspection and examination of the plaintiffs, that object having been answered, the books should go back to the custody of the party producing them; and that, if they are subsequently required for the purpose of any of the inquiries directed by the decree, the Master will use his discretion in requiring them to be produced, and the parties will have an opportunity of inspecting them before the Master. The decree arms the Master with power to call for the books, if he shall think their production necessary. If the Master does not exercise a sound discretion in calling for them, exceptions may be taken to the report. I shall require a certificate from the clerks in court as to the practice before I dispose of this motion.

On a subsequent day, his Lordship stated that he had

inquired the practice of the clerks in court, and that they concurred in opinion, that the defendant was entitled to have the books and papers delivered back to him.

1834.

SMALL
v.
ATTWOOD.

May 24th.

In this cause the plaintiffs having filed the supplemental bill, stated in 1 *Younge*, 507, the defendant, *John Attwood*, filed the following plea in bar of the supplemental suit:—

This defendant, by protestation, &c. to all the discovery and relief, in and by the said bill sought and prayed, doth plead; and for plea says, he has been informed and believes that the complainant, *Francis Baily*, did some time in or about the year 1828 absolutely sell and dispose of, and transfer to some person or persons unknown to this defendant, all his, the complainant's, *Francis Baily's* share, right, and interest in the partnership or company in the said bill mentioned, and therein called *The British Iron Company*, and did at and from that time cease to be a proprietor or member of such partnership or company; and was thenceforth acquitted and discharged from all obligations and every obligation in respect of his having been the proprietor of shares or any share in, or of having been a member of, such partnership or company, and did at and from such time cease to have any right, title, or interest, either at law or in equity, of, in, or to the property, effects, rights, and credits of such partnership or company, or any or either of such particulars, or any part or parts thereof, and did at and from such time cease to have any right, title, or interest of, in, or to any of the matters the subject of, or mentioned in, the original bill of complaint in the supplemental bill mentioned; and that the complainant, *Francis Baily*, from some time previous to had been, and at the

Bill, by certain persons, on behalf of themselves, and the other members of a joint stock company, to which an answer was put in, and a decree subsequently made, setting aside certain contracts between the plaintiffs and the defendant, and directing various accounts and inquiries. A supplemental bill was afterwards filed in the name of the same plaintiffs against the same defendant, seeking, among other things, a specific lien on a part of the purchase-money paid to the defendant. The defendant pleaded that one of the parties named as a plaintiff in the supplemental bill, had, previously to the filing of it, parted with all his interest in the partnership or company, and had ceased to be any longer a member or proprietor of the

company, and that he had not any other interest. The plea was overruled.

1834.

SMALL
v.
ATTWOOD.

time of filing this supplemental bill, was not a proprietor or member of the said partnership or company, or in any way interested therein, or liable in regard thereto, or in any of the matters in such supplemental bill mentioned. All which matters and things, &c.

Sir *Edward Sugden*, Mr. *Wakefield*, and Mr. *Lovat*, in support of the plea.—The bill in this case is filed by the plaintiffs, on behalf of themselves and all other the members of the *British Iron Company*. The prayer of the bill is in respect of their rights as members of that company. The statement takes up the original bill, which sets out a common partnership deed. There is nothing stated in the bill which shews that *Baily* had any interest, except as a partner. Mr. *Baily* is not even alleged to have any title or interest, except as a partner. The plea is this, Mr. *Baily* was not a partner at the time of the filing of the bill, and had not any interest. In the *King of Spain v. Machado* (a) it was held that the two persons, who were joined as co-plaintiffs with the king of *Spain*, but who were in fact only his agents, and had no actual interest in the subject of the suit, were improperly joined as plaintiffs, and a demurrer to the whole bill was allowed. In giving judgment in that case, the Court referred to two cases, *Cuff v. Platell* (b), and *Makepeace v. Haythorne* (c), as establishing the doctrine that a general demurrer for want of equity is good, where it appears on the face of the bill that of two co-plaintiffs one only has any interest in the matters in question. Suppose Mr. *Baily* had been the sole plaintiff at the filing of the original bill, and to have subsequently parted with his interest, how could a supplemental bill be filed in his name? It cannot be pretended that the junction of an improper party is no injury to the plaintiff; the cases have decided

(a) 4 Russ. 225.

(b) 4 Russ. 242.

(c) 4 Russ. 244.

that it is, and the present case cannot be distinguished from those which have been cited.

1834.

SMALL

v.

ATTWOOD.

Mr. *Knight*, Mr. *Wigram*, and Mr. *Sharpe*, in support of the bill.—The plea does not touch the merits of the case. The plea is singular in form, for it is only on information and belief. The decree was not made till after 1828. If *Baily* is now an improper party, he was no less so at the time when the decree was pronounced; no objection was, however, made at that time, and there is no allegation of any recent discovery of his having parted with his interest (a). If *Baily* had not been made a party, either as plaintiff or defendant, the bill would have been demurred to. In support of the bill, *Lord Redesdale's Treatise on Pleading* (b), *Jones v. Jones* (c), and *Dormer v. Fortescue* (d), were cited.

Sir *Edward Sugden*, in reply, contended that, on the argument of the plea, the plaintiffs could not insist that *Baily* was liable, for the truth of the plea was not in issue. The bill professed to be the bill of the plaintiffs therein named, on behalf of themselves, and all other the mem-

(a) The counsel for the plaintiffs then proceeded to read the decree in the original cause; when it was objected, on the part of the defendant, that the plaintiffs, having stated in their supplemental bill so much of the decree as they had thought fit, were bound by that statement, and were not at liberty to read the decree.

Mr. *Knight*, Mr. *Wigram*, and Mr. *Sharpe*, in support of their right to refer to the decree, insisted that the fact, whether *Baily* had or had not any interest, could not be disposed of without a refer-

ence to the decree, and that the only passages from the decree which they desired to refer to were those directing the account of the manner in which the mines had been worked, and which directed an account to be taken of the net profits, which would shew that *Baily* was interested in the result of those inquiries.

The Court declined to decide this point.

(b) 4th Edit. p. 61.

(c) 3 Atk. 217.

(d) Id. 123, 133.

1834.
 {
 SMALL
 v.
 ATTWOOD.

bers of the *British Iron Company*; but, if the plea were considered to be true, which on the argument it must be, then there was no foundation for the allegation in the bill.

Dec. 23rd.

The LORD CHIEF BARON.—This is a plea to a supplemental bill; and the effect of the plea is this:—that *Francis Baily*, who is one of the plaintiffs in the supplemental bill, had disposed of his share and interest in the partnership; that, at the time the bill was filed, he had no interest whatever in any of the proceedings. That is the substance of the plea; and the question is, whether that is a good defence, under the circumstances of this case, to the supplemental bill. In order to determine this question, it is necessary to consider what was the scope and effect of the original bill, and what is the nature of the supplemental bill. The object of the original bill was to set aside an agreement which had been entered into between the plaintiffs and the defendant, on the ground that it had been obtained by imposition. The Court decreed accordingly, and directed the money to be refunded, and at the same time directed that the plaintiffs should account for the profits of the property while it was in their possession and under their management. That was the substance of the bill in the original cause. Facts had existed during the progress of the original cause, which were not discovered till after the decree was pronounced. Those facts were of this description:—that the money which had been paid by the plaintiffs, as a consideration for the purchase, was paid in bank notes, and those identical bank notes were handed first to the bankers of Mr. *Attwood*, and afterwards by those bankers to a stock broker; and that money was laid out in the purchase of the stock which is the subject of the present suit:—and the object of the present suit is to obtain a declaration that there was no transfer of the property; that the stock was in fact the

property of the plaintiffs in the suit; and there is an offer to make all proper allowances with reference to what was provided for in the decree in the original suit. Now, it appears to me, that this is only a modification or alteration of the relief in the original suit; and it comes within the language of Lord *Hardwicke*, in the case of *Dormer v. Fortescue*, in which he says—"I think the bill and the supplemental bill ought to be considered as one bill and connected together (a)." Considering the supplemental bill nothing more than a continuation of the original suit, I think on that ground—if it rested on that ground alone—it would not be sufficient to say, that, after the filing of the original bill, and before the filing of the supplemental bill, *Francis Baily* had parted with his interest. But, independently of that consideration, it is alleged in the plea, that *Francis Baily* had disposed of his interest in the partnership, and that he has no interest whatever in the subject-matter of the suit. In an ordinary case these averments must, for the purpose of the plea, be considered as true, and true to the extent to which they are stated; but it is apparent enough, that he is interested in the original suit. His interest is this: that he is liable to the account directed in the original suit; that he may be liable to costs; and, if he is interested in the original suit, such is the object of the supplemental suit, that he must of course be interested in the supplemental suit. It appears to me, therefore, that the fact is not made out and established, and that we may correct or restrain the allegation in the plea by referring to proceedings in the cause, which render it impossible to interpret the language of the plea literally to the extent to which, if it stood by itself, it might be carried. I am of opinion that the plea must be overruled.

1834.
 SMALL
 v.
 ATTWOOD.

(a) 3 Atk. 133.

1835.
 {
 SMALL
 v.
 ATTWOOD.
 Jan. 16th,
 1835.

The defendant *Attwood* desiring to have the plea reheard, Mr. *Wakefield* and Mr. *Lovat* now moved that all proceedings against him to compel him to answer might in the interim be stayed; and they cited *Thorpe v. Macaulay* (a), *The King of Spain v. Hullett* (b), and *Wood v. Milner* (c), in which demurrers were overruled, and orders to stay further proceedings against the defendants were made, pending appeals to the House of Lords.

Mr. *Wigram* and Mr. *Sharpe*, *contrà*.—It is not a motion of course, to deprive a party of his right to a decree made in his favour. Before a party can apply for this, he must satisfy the Court that there is ground for his application, and that irreparable mischief would ensue if it were refused. *Hugenin v. Baxely* (d), *Waldo v. Caley* (e), *Willan v. Willan* (f), *Nerot v. Burnand* (g), *Walburn v. Ingleby* (h). The cases cited on the other side were merely bills of discovery, and there was no discussion. The plea here is not to the merits, but to a mere matter of form. This application is merely for delay.

Mr. *Wakefield*, in reply.—The plea is one of vital importance. There has been no delay in presenting the petition of rehearing. The decision on the plea was given on the 23rd *December*, and the petition preferred on the 12th of the following month, the Court being closed during the interval. The object of the appeal is totally lost, unless the proceedings are stayed. In the cases cited there were large accounts to be taken and documents to be delivered up. Where there are heavy accounts the pro-

(a) In Chancery, Nov. 20, 1820;
 and see 5 Madd. 218.

(b) 2 Bligh, N. S. 91.

(c) 1 J. & W. 636.

(d) 15 Ves. 180.

(e) 16 Ves. 206.

(f) Id. 216.

(g) 2 Russ. 56.

(h) 1 Mylne & K. 61.

ceedings are not stopped. If the defendant is compelled to answer, he cannot be reinstated in the same position.

1835.

SMALL

v.

ATTWOOD.

The LORD CHIEF BARON (a).—The money is in Court; therefore, there is no danger of its being made away with. I think, on principle and common sense, I ought to accede to the motion. In the cases cited for the plaintiffs no prejudice could arise to the defendants by expediting the proceedings, but here it is otherwise. *Thorpe v. Macauley* is a very strong case.

Motion granted. The defendant *Attwood* to pay the costs of the application.

The plea now came on for re-argument.

Feb. 10th.

Mr. *Wakefield* and Mr. *Lovat*, for the plea.—In general, a party having parted with his whole interest has no right to sue in respect of that interest in a Court of equity; so, where a party files a bill, and then parts with all his interest in the suit, he has no right to file a supplemental bill. *Tonkin v. Lethbridge* (b). In this case the supplemental bill having been filed after decree, the original and supplemental suits are in effect distinct. In suits so circumstanced, it is not necessary that there should be the same parties to each. For instance, where one individual files a bill on behalf of himself and others, and ceases to have an interest in the suit, the others may come before the Court by supplemental bill. *Dixon v. Wyatt* (c). The case of *Dormer v. Fortescue* (d) will be relied upon on the other side; but the observation of Lord *Hardwicke* in that case was made with reference

(a) Lord Abinger.

(c) 4 Madd. 392.

(b) G. Coop. 43.

(d) 3 Atk. 133.

1835.
 SMALL
 v.
 ATTWOOD.

to the special circumstances before him; besides, the party had not parted with his interest. In *Hartwell v. Townsend* (a), a defendant in the suit having parted with all his interest after the decree was made, filed a bill of review; and the House of Lords held that he could not do that. There can be no difference in principle, whether the person who is the active party in these cases is plaintiff or defendant. *Vere v. Glyn* (b). In the *King of Spain v. Machado* (c) the suit was circumstanced in some measure like the present. One *Mendisabel* having come into this country, and having arrested *Machado* for the sum of 80,000*l.*, which was paid into Court, the King of *Spain* filed his bill against *Machado*, alleging that the money was part of an indemnity to which the King of *Spain* was entitled. Afterwards, it was understood that the money had got into the hands of *Hullett* and *Widder*, the agents of *Mendisabel*. The King of *Spain* then filed a bill against *Machado*, *Hullett* and *Widder*. Both these bills were in their frame original; but it is quite clear that, as far as *Machado* was concerned, the second bill was supplemental to the first. Now here, although the bill is called a supplemental bill, it is in fact an original bill in the nature of a supplemental bill: it seeks to give effect to the decree in the original cause. But it will be said, that *Francis Baily* is under liabilities to Mr. *Attwood*. Supposing a balance due from the company to Mr. *Attwood*, *Baily* is under no liability to *Attwood*, so as to give him an interest in impounding this money. He must shew such a liability as will give him an interest in the 192,000*l.* stock. The result of this suit will not affect the general account one way or the other. Suppose a special property in this money, vested in the company, to be traced to the defendants; they cannot get more than is due to them in respect of that money. There is no interest be-

(a) 2 Bro. P. C. 107.

(b) 2 Dick. 441.

(c) 4 Russ. 225.

yond liquidating that particular balance, and in that Mr. *Baily* has no interest.

1835.

SMALL

P.

AITWOOD.

Mr. *Knight*, Mr. *Wigram*, and Mr. *Sharpe*, in support of the bill.—The supplemental bill seeks to vary the account decreed in the original suit. It seeks to withdraw from that account certain property which has been traced into the funds, and laid hold of by injunction. It has nothing to do with setting aside the contract, but only with the account. As to that, the two suits are the same; and, if it were to the interest of the plaintiffs to have the accounts taken as against *Baily* in a different mode, they had a right to make him a party. The account, though varied, cannot be taken in *Baily's* absence. It cannot be separated into parts. The stock is one item in it. This bill relates to matter intimately connected with the original suit, which ought to have been embodied in the original bill, if it had been known. In fact, *Baily* parted with his interest *pendente lite*; and alienation, under these circumstances, makes no difference in the rights of the parties or their representatives. The alienee is bound by the decree, though not a party; and *Baily* represents the alienee: *Garth v. Ward* (a), *Bishop of Winchester v. Paine* (b), *Landon v. Morris* (c), *Mitford, Treat. Eq. Pl.* 61, 62. Whoever, therefore, purchased from *Baily*, purchased subject to the accounts to be taken in this suit. Whatever was the contract of indemnity between *Baily* and his partners, that will not destroy his liability to *Aitwood*. He cannot be relieved from this suit while any of the purposes of the original suit remain unperformed. *Hartwell v. Townsend* (d) is not an authority for the position advanced. The case is loosely reported, being little more than an abstract of the printed case laid before the House

(a) 2 Atk. 175.

(b) 11 Ves. 197.

(c) 5 Sim. 247.

(d) 2 Bro. P. C. 107.

1835.
 {
 SMALL
 v.
 ATTWOOD.

of Lords. It is clear that the decision must have gone on some other ground. The doctrine in *Dormer v. Fortescue* (a) supports the present bill. Where a party assigns over a legal interest, though the assignee may sue in a Court of equity, he cannot do so, except in the presence of the assignor. The legal interest must be bound. *Cathcart v. Lewis* (b). Now, *Baily* is one of the persons in whom the legal interest is vested as a trustee. *Attwood* is liable to an action by the trustees, and he will remain so, unless the legal right is bound by the suit. Another thing is, that *Baily*, being one of the parties to whom the money is to be paid, is a necessary party to any release to be given for the payment of the money. It may be added, that there cannot be a plea to a supplemental bill, of matter which took place before the decree in the original suit.

Mr. *Wakefield*, in reply.—The bill does not seek to vary the decree; it does not seek to interpolate into that account one single item. It is a supplemental bill in aid of an original decree for the purpose of obtaining a security for that which has been decreed. This was not merely an equitable sale by *Baily*, but a transfer of his whole interest. There was no necessity to make him a party to the present suit; *Brace v. Harrington* (c); but, if made a party at all, he should have been a defendant, not a plaintiff. In this Court an assignee has no right to go on with the suit in the name of the assignor. At law, the assignee cannot sue; but here, where he can, he must. In *Dormer v. Fortescue*, the heir-at-law would never have obtained the relief he did, if he had sold his interest. Then, as to the plaintiffs being trustees: they have not described themselves as instituting the suit in that character. They file the bill on behalf of themselves and others, as partners in

(a) 3 Atk. 133.

(c) 2 Atk. 235.

(b) 1 Ves. jun. 463.

the *British Iron Company*, and, if not entitled to relief in that right, they are not entitled in any other. Besides, though named trustees, they were only to be so in case any assignment should be made to them.

1835.

SMALL
v.
ATTWOOD.

Feb. 21st.

The LORD CHIEF BARON (a).—This plea, in effect, is intended for the purpose of setting up a short answer to this supplemental bill, by stating facts which, if true and incapable of denial, would put an end to the cause without the delay and expense of putting in a full answer, and hearing the cause after a further investigation. That appears to me to be the only rational object of a plea to a bill in equity; because, if the whole matter of the plea may be taken advantage of by answer, it is obvious that there is no occasion to admit of a plea at all, unless for the sake of convenience and saving of expense, by bringing the matter to a short issue, and thus making further investigation unnecessary. It is, therefore, important that the plea, being brought forward for that purpose, should contain specific allegations capable of denial. I know very well that it has been said in some cases, that, where the matter is not precisely within the knowledge of the party, it will be a sufficient allegation to state that it is so to the best of his knowledge, information, and belief. That may be true as a general proposition; but it appears to me that a plea of this sort must be tried by this criterion. Supposing the plaintiffs were to take issue on this plea, what would be the result? The *onus probandi* would be cast on the defendant, because he undertakes to shew that *Baily* having no longer any interest in the suit, the bill ought to be dismissed. If the *onus probandi* is on him, he must be as capable of stating the facts in his plea as of proving them. Now, what is the plea in this case? The whole rests on his information and belief. If, upon the

(a) Lord Abinger.

1835.
SMALL
v.
ATTWOOD.

issue so taken, he were to prove his information and belief, that would not be an answer to the bill. The plea ought to be clear and specific, requiring no further investigation than to ascertain the truth or falsehood of the facts alleged. Now here it is not said that there was a conveyance of *Baily's* interest, but only that the defendant is informed and believes that there was such a conveyance. Had this been a case where, from the nature of the transaction and the issues which might have been joined on the plea, the *onus probandi* had been cast on the plaintiff, the plea might have been sufficient. Here, the *onus* being cast on the defendant, he is bound to state to the Court what he is capable of proving. He ought, therefore, to set forth what, on the face of the plea, would be an answer to the bill. He only states his information and belief, from which he draws certain inferences, some of which may be true and others must be false.

I lay down no general rule of pleading in cases where the defendant has no distinct knowledge of the facts which he pleads; but I wish to be distinctly understood, that in this case the *onus probandi* being on the defendant, I think he ought to shew by his plea that which he was bound to prove. If he was deficient in evidence on that subject, he might have filed a bill against *Baily* for a discovery. If he has not done so, it is not the fault of the plaintiffs. The present bill was filed in 1832. He files his plea after the decree in the original suit was made. He makes no apology for not putting in his defence earlier. The fact which he mentions having occurred in the year 1828, he does not state the nature of his information, or from whom he got it, or what were the particulars. If the defendant must prove that fact, so I say he must aver that fact.

Another ground upon which I proceed is this:—There may be various ways in which Mr. *Baily* parted with his interest, or submitted to a modification of his interest, so as to produce very different results. He may have assigned his interest in such a manner as to bind himself to all the con-

sequences of the suit. He may have assigned it so as to make himself still liable for the costs. The plea states the defendant's information and belief as to certain consequences arising from the assignment. It is quite clear that that portion of the plea is matter of pure law or of mixed law and fact. Now if the assignment was produced to ascertain whether the legal consequences stated in the plea resulted from it, to what endless litigation that would lead. If a defendant files a plea going to the whole merits, if that plea depends on some written document requiring construction, then as that written document is all that supports his plea, he ought to put it on his plea, and not leave the Court to act upon his imagination. If I decide on this plea, I must decide on that of which I know nothing. These are additional reasons for considering the plea as too uncertain for a Court of Equity to deal with, for the purpose of preventing all further inquiry.

I go a step farther—the defendant has drawn an inference in law which he is not justified in drawing. I must assume the facts to be truly pleaded. But it is a constant rule, that you do not admit what is not properly pleaded, and is not a proper inference from certain facts. Now, in order to dispose of this bill on the present plea, it strikes me that *Baily* must not only have discharged himself as between himself and his co-plaintiffs, and himself and the rest of the world, from the partnership liability, but from all consequences which his own co-plaintiffs might attach to him, by making him a party to this suit. But a party by assigning his interest does not depart with his liabilities. By selling all his interest he cannot deprive his partner of any title arising from previous obligations; yet this plea states the defendant's information and belief that the party is divested of all his liabilities. I cannot state that to be true in fact which is not true in law.

But there is another important point to be considered. It was said by Mr. *Wakefield* in argument—an

1835.

SMALL
v.
ATTWOOD.

1834.
 {
 SMALL
 v.
 ATTWOOD.

wards moved the Court in this cause, and in another cause then pending in this Court, for an injunction and certain issues; but that, so far as the application related to the injunction, no affidavit could be read; and that, inasmuch as that part of the application relating to the issues was refused, the Master ought not to have allowed any part of the costs relating to the application for the said issues; nevertheless the Master had, in his taxation, allowed the sums following, some wholly, others partly, relating to or caused by the application for the said issues; that is to say, &c. [Then followed a variety of items for preparing and engrossing affidavits, &c.] *Thirdly*, that the execution of the commission in this cause occupied 103 sitting days, and no more; but that, in computing the fees to the commissioners, the Master paid no regard to the number of days on which the parties were actually engaged in executing the commission, but the depositions being 5970 office folios, he allowed 199 sittings, at the rate of 30 folios a day, the effect of which was to allow the commissioners rather more than 4*l.* 1*s.* a day, instead of the regular fee of 2*l.* 2*s.* a day. *Fourthly*, that for copies of papers and documents for the use of the Lord Chief Baron, the following items had been allowed, that is to say, &c.

Mr. *Wakefield*, in support of the petition, abandoned the first ground of exception. He at first contended that this was virtually a town cause, inasmuch as the plaintiffs represented a *London* company, and employed a *London* solicitor; and therefore the mere circumstance, that some few of the individual partners resided in the country, would not make it a country cause, and entitle those parties to close copies; but he afterwards waived this point, upon learning from the officers of the Court that any one plaintiff residing in the country makes the cause for this purpose a town cause. He then contended that there could be no costs for the issues, the motion for the issues having been dismissed. That being so, if the costs which

have been objected to, secondly, are applied only to the injunction, they are most exorbitant. Besides, they cannot properly be charged in reference to affidavits; for, where an injunction has been obtained to restrain proceedings at law, upon the coming in of the answer, no affidavits can be read. As to the third ground of exception, the Master ought only to have allowed fees to the commissioners for the days on which they actually sat, and then at the rate of 2*l.* 2*s.* a day; but it has been the habit to suppose that the commissioners can never take depositions of more than thirty folios per day; and the consequence of acting on that supposition in the present case is this, that they have received fees for 199 imaginary days. In particular, with respect to the examination of one *John Burr*, the number of days have been increased by this process from one to thirty-five, his deposition occupying 1041 office folios. The Court allows the commissioners 2*l.* 2*s.* a day, but not 2*l.* 2*s.* for every thirty folios. [The *Lord Chief Baron*(a).—From ten o'clock till four would be a reasonable time for their sitting.] Then the commissioners' agent has been allowed at the rate of 3*l.* 3*s.* per day. It is said, on the other side, that this has been taxed down to 2*l.* 2*s.*, but, in strictness, he has no right to more than 13*s.* 4*d.* per day. *Pultney v. Cornwall*(b). Lastly, with respect to the copies of documents furnished to the Court, the general rule is to furnish the Judge with the title of the cause and the prayer of the bill; and an allowance is made for this in the taxation of costs as between party and party; but this is the only charge in this respect which the party winning in costs has a right to make against his adversary. Here the charge is made for a variety of other documents, and amounts to 334*l.*

1834.
 SMALL
 v.
 ATTWOOD.

Mr. *Wigram*, and Mr. *Sharpe*, *contrà*.—As to the costs of the injunction no evidence has been brought

(a) Lord *Lyndhurst*.

(b) 2 *Fowler*, 312.

1834.
 {
 SMALL
 v.
 ATTWOOD.

forward on the other side to shew that the affidavits were improper; and, until evidence has been produced against the Master's finding, the Court will presume the Master's finding right. The motion for the issues was refused, with costs; and the Master was directed to ascertain what were the additional costs occasioned by the plaintiffs' praying for the issues, and to pay those costs to the defendant. But nothing was said in the order as to the costs for the injunction. Those costs, therefore, remain, and may very properly have arisen from affidavits. It is true that affidavits cannot be read against the answer upon an application to stay proceedings at law; but it is different where affidavits are used to supply facts as to which the answer gives no information. *Taggart v. Hewlett (a)*, *Hodgson v. Dean (b)*. It may be presumed, therefore, in the absence of any evidence to the contrary, that the Court granted the injunction upon proper affidavits. Then the objection as to the fees allowed to the commissioners cannot be received now. A motion should have been made to suppress the depositions, or the objection should have been made before the Master, which was not done. The defendant knew the rule of payment; he knew that the commissioners were paid according to the quantity of business done, which is regulated by the number of folios. It is impossible to go into evidence upon this point now. [The *Lord Chief Baron*.—But, if it is an abuse of the rule, the Court is bound to take notice of it: it is a monstrous abuse, if true.] They had an opportunity before the Master of making an affidavit as to the number of days on which the commissioners sat. As it is we have no evidence to answer. With respect to the documents furnished to the Court, the Court is no doubt usually furnished with the title of the bill and the prayer; but there is no rule which limits the Court in this respect. [The

(a) 1 Mer. 499.

(b) 2 Sim. & Stu. 221.

Lord Chief Baron.—If it is absolutely necessary that the Court should be furnished with these documents, the costs of them are costs in the cause.]

1834.
SMALL
v.
ATTWOOD.

Wakefield, in reply.—Upon an application of this nature, which is only for leave to except, it is not necessary to go into strict evidence. There is, however, evidence of the objection as to the commissioners' fees having been taken before the Master; there being an indorsement on the bill of costs as to the number of days on which the commissioners sat, which indorsement was made by the defendant's solicitor at the time of taxation. With respect to the costs of copies for the use of the Court, a similar point arose in *Boxon v. Williams*(a), where *Alexander*, C. B., called for further copies of documents; but the costs of them were not allowed as between party and party.

The LORD CHIEF BARON, at the close of the argument, expressed his opinion that the affidavits which had been referred to might have been read, and therefore that the objection as to the costs of the injunction must fail. He was also satisfied that the other objections could not be sustained, except that with reference to the commissioners' fees, he would make some inquiries of the Master.

Upon a subsequent day the Master, in answer to some inquiries made by the Court, said, that the general rule on taxation, with regard to commissioners' fees, was to pay them for so many folios; and that no evidence was given as to the actual number of days on which they sat. There had, however, been a case in which Master *Spranger* had required the commissioners to shew that they had sat extra hours. In the present case, he, the Master, had had no

(a) Not reported.

1834.
—
SMALL
v.
ATTWOOD.

guide, except the number of folios. An objection was made to the number of folios containing *Burr's* evidence, but that was with reference to a long account which had been inserted in his deposition.

To a question likewise put by the Court, the solicitor of the plaintiffs said, that no statement was made during taxation as to the number of days, but that the calculation was by thirty folios.

THE LORD CHIEF BARON.—The defendant ought to have objected to the certificate at the time of taxation, if it did not contain the proper statement as to the time of the commissioners' sitting. It is the duty of the commissioners not to take a document such as this, and copy it into the deposition, but to examine the witness *viva voce* as to each of the items. As the commissioners, however, have taken it as a deposition, I must assume, under present circumstances, that they have done correctly. With respect to the objection which has been raised relative to the costs of copies furnished to the Court, I think this case differs from that of *Boxon v. Williams*. There it does not appear that the papers were called for during the progress of the cause, but after judgment had been delivered. In this case it was perfectly impossible to give judgment without copies or originals; but I am sorry if I have been the occasion of expense by adding to the length of the bill of costs. The petition must be dismissed, but, as I cannot say it was not proper to bring it before the Court, it must be without costs.

Petition dismissed, without costs.

The ground of the petition presented by the plaintiffs was, that the Master had disallowed a sum paid by the plaintiffs to some accountants for examining certain books and accounts produced by the defendants. The petition

alleged that the depositions of the witnesses were read at the hearing of the cause, and were entered in the decree as read, and that they established the inaccuracy of the defendant's statements to the satisfaction of the Court.

1834.
SMALL
v.
ATTWOOD.

Mr. *Wigram*, for the petitioners.—The costs of an accountant generally are not costs in the cause; but there are some exceptions to the rule. In *Todé v. Thompson* (a), a bill was filed by an accountant under a will against the executrix. The answer sworn to by the executrix was false; she having taken her statement from that of her daughter, who was residuary legatee. An accountant was employed, and the Vice-Chancellor, upon a special application, allowed the costs of the accountant as costs between the parties.

Mr. *Wakefield*, *contrà*.—That was a special application, which shews that such a practice is not usual. In cases of fraud there may be a special application that the costs of an accountant may be made part of the decree; but that is entirely different from the present case.

The LORD CHIEF BARON.—The charge for the accountants ought to have been made part of the decree. It does not come under the general denomination of costs. It would not have been costs without the special case of fraud. If fraud was to be made out, it ought to have been brought forward before, and the special ground ought to have formed part of the decree.

Petition dismissed, with costs.

(a) Not reported.

1834.

Nov. 19, 27.

BORRADAILE and Another v. BRICKWOOD.

Under the stat. 2 & 3 Will. 4, c. 125, for granting relief to the *West Indies*, the commissioners have no power to advance monies except upon such securities as shall have priority over all other securities.

A mortgagor out of possession is not "an owner or person interested" in the property, within the terms of the act, so as to authorize the commissioners, without consent of the mortgagees, to advance monies to him in respect of damage done by hurricanes to the mortgaged premises.

Semble, that where the property has been already restored, the commissioners have no power to advance money for the purpose of reimbursing the party who has restored it.

MICHAEL White being seised in fee of two plantations in the island of *St. Vincent*, called *Sharpe's* and *Petit Bordels*, by several successive indentures of mortgage conveyed and assigned them to Messrs. *Rucker*, to secure the several sums of 3,780*l.*, 5,300*l.*, and 1,228*l.* 19*s.* 9*d.* By the last of these indentures, dated the 2nd and 3rd of *April*, 1818, *Michael White* covenanted, until the said several sums should be paid, to consign the crops and produce of the said plantations to Messrs. *Rucker*, or as they should direct. On the 8th *July*, 1830, Messrs. *Rucker*, being indebted to *William Hodges* in the sum of 7,000*l.*, deposited the said indentures of mortgage with him as a security for that sum. In *November*, 1831, a commission of bankrupt was awarded and issued against Messrs. *Rucker*, and they were declared bankrupts, and *J. W. Borradaile* and *Joseph Edlmann* were chosen assignees of their estate and effects. At the time of the bankruptcy, the said several sums of 3,780*l.*, 5,300*l.*, and 1,228*l.* 19*s.* 9*d.*, with a large arrear of interest, were due and owing from *Michael White* to the *Ruckers*. In *June*, 1833, the assignees, together with *William Hodges*, filed a bill of foreclosure in the Court of Chancery of *St. Vincent* against *Michael White*, and by an order in that cause a receiver was appointed of the two plantations, who took and continued possession of them up to the time of the present application. In the course of the year 1831, a hurricane occurred in *St. Vincent*, by which the said two plantations, and likewise another which belonged to *White*, called *Mount Alexander*, were greatly injured. From the time of this hurricane, *White* ceased to make any consignments to Messrs. *Rucker* in satisfaction of their mortgage debt; but applied the produce of the mortgaged premises to his own use, or in reparation of the damage

done to the plantations. These reparations were completed about the month of *January*, 1833; and about that time, *White*, without giving notice to the assignees or *William Hodges*, applied to the commissioners, under the stat. 2 Will. 4, c. 125, for the relief of the *West Indies*, for a loan on account of the damage which had occurred to all the three plantations. The commissioners accordingly awarded him the sum of 3600*l.*, to be advanced by means of *Exchequer* bills; and *White* executed to the commissioners a mortgage of all the three plantations to secure the said sum. The *Exchequer* bills had not yet been delivered to him.

An application was now made under the 54th section of the statute, upon affidavits, verifying the foregoing facts, that the said assignees and *William Hodges* might be at liberty to file a bill in this Court against the commissioners, jointly with *White*; and that such bill might pray that the intended loan of 3600*l.*, as far as it extended to the two plantations called *Sharpe's* and *Petit Bordels*, might be declared illegal and improper; that any mortgage of the said plantations to be taken by the said commissioners might be declared posterior and subject to the existing mortgage to the *Ruckers*; that the commissioners might be restrained from making, and the said *White* from receiving, the said loan of 3600*l.*, other than as aforesaid; and that the indenture of mortgage executed by *White* to the commissioners might be delivered up to be cancelled.

Mr. *Wigram*, for the plaintiffs.—In this case Messrs. *Ruckers* are mortgagees of two of the plantations in question, and have not only an interest in that property, but a right to the possession of it under the foreclosure. They are, therefore, entitled to the relief given by the 11th section of the statute (a). A mortgage, however, has

(a) By which it is enacted, that therein mentioned “shall be advanced and lent for the purpose a portion of the Exchequer Bills

1834.

BORRADAILE
v.
BRICKWOOD.

1834.

BORRADAILE
v.
BRICKWOOD.

been made of the three estates by *White* to the commissioners, a deed has been executed, and the commissioners have delivered to *White* a certificate, which will entitle him to receive the money. This transaction could not legally take place; the commissioners had no right to make such an advance; this is clearly within that range of cases where a person has a right to come into this Court and have a deed which may affect his legal title removed, or, if the deed be not perfected, to stay the execution of it (a). It is provided by the act that the commissioners may advance money to owners or persons interested. Is *White* an owner or person interested? There must be a rational construction of the act. He is the owner of the equity of redemption, but the plaintiffs are the substantial owners of the property. Where a mortgagee is content to take his deed, and to leave the possession in the hands of the mortgagor, the commissioners may fairly deal with the mortgagor. But that is not the present case. In this case, it is true, that in the first instance the mortgagor was left to manage, but he was to consign the produce of his management to the mortgagee; he was not, therefore, even then, solely interested. The plaintiffs, however, are no longer in that situation; they have taken all the steps they could to establish their right to the possession, and they have now got a receiver and manager appointed. *White*, therefore, is not the person to come forward against

of enabling the owners of and persons interested in the estates, which have sustained injury in the said islands from hurricanes, to resume the cultivation of such estates, and the manufacture of the produce thereof, by restoring works and machinery destroyed or injured, and providing the requisite contingencies and supplies for

such estates, and the negroes belonging thereto, and restoring, as far as the same can be accomplished, such estates to the condition in which the same were before the said injuries were sustained."

(a) *Hayward v. Dinsdale*, 17 Ves. 111.

the mortgagees to take a large sum of money, and to declare that his is the first charge upon the premises. The plaintiffs are the substantial owners—owners in law and in possession. Another circumstance is, that the premises have been restored. Now the object of the act of Parliament is clearly this, to enable proprietors of land, where the property has been laid waste, to borrow money for its restoration; for, until restoration, the property is unproductive of public good: but, where property has been already restored by the proprietor, he cannot say he has need of the money, and the commissioners have no right to advance it.

1834.
BORRADAILE
v.
BRICKWOOD.

Mr. *Simpkinson* for *Michael White* observed, that the act authorized the commissioners to lend the money not to the owners *or* persons interested, but the owners *and* persons interested, therefore to all persons who had an interest in the property. And he said that the 21st section of the act, which gives the property to persons borrowing of the commissioners, clearly refers to such persons as are previously described, namely, owners and persons interested; and this description comprehended the defendant *Michael White*. He added, that, under the 12th section of the statute, the commissioners had power to re-pay money already advanced. [The *Lord Chief Baron*.—That section only applies to a temporary advance by the commissioners themselves.]

Wigram, in reply.

THE LORD CHIEF BARON.—I cannot help thinking that the object of the act of Parliament is wholly to protect the commissioners. They have a public duty to perform, and are liable to vexatious suits in the course of performing that duty. The legislature has therefore said, that it shall

1834.

BORRADAILE
v.
BRICKWOOD.

not be optional with the complaining party to sue them at his own pleasure; and with a view of preventing them from being continually harassed, it has provided, that, before any suit be instituted, leave be first had and obtained from this Court. I am of opinion, however, that in the present instance a sufficient case has been made out on the part of the plaintiffs, and that leave must be given to file the bill.

Nov. 27th. Mr. *Wigram* and Mr. *O. Anderdon* now moved for the injunction, contending that irreparable mischief would ensue if the loan were allowed to proceed.

Mr. *Simpkinson* and Mr. *Lewis*, having been served with notice of the motion, were proceeding to address the Court for *Michael White*; but, as he had not appeared to the bill, the Court would not hear them.

Mr. *Coleridge*, for the commissioners.—The security taken by the commissioners in no way affects the rights of the plaintiffs. Unless the advance in question comes within the terms of the act, their security can have no other priority than the security given by any other persons. This transaction is not within the act. It cannot, therefore, have the effect imputed to it, of taking priority over all other claims. The two estates in which the plaintiffs are interested, are in the hands of a receiver; and by the 23rd section, when an estate is so situated, no loan can be effected under the act, until a reference has been made to the Master in Chancery in *St. Vincent's*. The present, therefore, is not a loan within the act. The commissioners had no intention of getting an extraordinary priority in regard to those two estates; they only wanted a security *quantum valeat*. If they have lent money without taking the proper precautions, that is no injury to the plaintiffs. The injunction must, therefore, fall to the ground.

THE LORD CHIEF BARON.—The commissioners have no power to advance money, except under the act of Parliament. By the terms of the act, all mortgages and securities given to the commissioners shall, whether registered or not, have priority over all other mortgages or securities charged or chargeable upon, or affecting, the properties, for the restoration of which advances shall be made under the act. Now, if this advance was made partly on the security of the two plantations, that comes within this clause of the act. By this advance you give the commissioners the right of establishing their priority, because the legislature requires, in order that the public may not be damnified, that, when sums of a particular kind are advanced, the securities for those sums shall have priority over all other securities. The commissioners are not authorized, in discharge of their public duties, to advance monies, except upon these terms. To adopt their construction of the act would be hazarding the public money, and defeating the intention of the legislature. Then here the advance was intended to be made for all the three estates, in which different parties are interested; but where different parties are interested in different estates, you cannot lump them together in this way. You might take the other estates as sureties under the act.

1834.

BORRADAILE
v.
BRICKWOOD.

Injunction granted.

1834.

Nov. 20th.

Testator bequeathed 2200*l.* stock, *his property*, standing in the joint names of himself and wife, to trustees, upon trust to pay the interest and dividends to his wife for her life, and, after her decease, to distribute the capital amongst his grandchildren by name; and he directed that in case he had not that sum standing in his name at the time of his death, the same should be made up out of his other estate and effects:—*Held*, that the stock was the absolute property of the wife surviving, and that she must elect between this and the other benefits bequeathed to her by the testator's will.

COATES v. STEVENS.

SILAS Stevens, by his will, dated the 25th April, 1823, after directing his just debts, &c. to be paid, gave and bequeathed all his household goods and furniture, plate, linen, and china, and also his ready money, bills, &c., unto his dear wife, *Sarah Stevens*, for her absolute use and benefit; and he gave and devised certain leasehold messuages, specified by name, unto his said dear wife, *Sarah Stevens*, and her assigns, for her natural life; and, after her decease, he gave, devised, and bequeathed the said several leasehold premises to *John Montague* and *Robert Briggs*, their executors, administrators, and assigns, for the residue of the terms which he the testator had therein, upon trust, after the decease of his said wife, to sell and dispose of the same, and invest the net money to arise from the sale or sales thereof, in their or his names or name, in the purchase of stock, or upon real securities, and to stand possessed of and interested in the said stocks, funds, and securities, and the dividends, interest, and annual proceeds thereof, upon the same trusts as were thereafter declared concerning the capital sum of 2200*l.*, 3*l.* per Cent. Reduced Bank Annuities; and he thereby gave and bequeathed unto the said trustees, their executors, administrators, and assigns, the capital sum of 2200*l.*, 3*l.* per Cent. Reduced Bank Annuities, *his property*, then standing in the joint names of himself and his wife in the books of the Governor and Company of the Bank of *England*; and he empowered his said trustees, or the survivor of them, his executors or administrators, with the consent in writing of his said wife during her life, and, after her decease, at their own discretion, to vary the securities on which the said sum might be invested; and in case the said testator should not have 2200*l.*, 3*l.* per Cent. Reduced Bank Annu-

1834.

COATES
v.
STEVENS.

ities standing in his name at the time of his decease, then he directed the said sum of 2200*l.* of the said annuities to be made up out of the said other parts of his said estate and effects; and the said testator's will was, and he thereby directed, that the said trustees should stand possessed of and interested in the said stock, and the dividends, interest, and annual proceeds thereof, upon the trusts following, that is to say, upon trust to pay the dividends, interest, and annual proceeds of the said capital sum of 2200*l.* 3*l. per Cent.* Reduced Bank Annuities, or other the stocks, funds, or other securities aforesaid, as the same should from time to time become due and be received by them or him, unto his said wife, *Sarah Stevens*, or her assigns, for her and their own proper use and benefit, for and during the term of her natural life; and from and after the decease of his said wife, then to transfer or pay the said capital sum, or other the stock, funds, and securities aforesaid, unto and between and amongst his grandchildren, (naming them), or such of them as should be then living, and the lawful issue of such of them as should be then dead leaving lawful issue, in equal shares and proportions, share and share alike, as tenants in common; the share of the said grandchildren and issue being males, to be vested in them respectively at their respective ages of twenty-one years; and the shares of such of them being females, to be vested in them at the like age or marriage. The will then contained clauses for the survivorship and accruer of the grandchildren's shares, and for their maintenance and advancement after the death of his said wife, and during their minority; and as to all the rest, residue, and remainder of the testator's personal estate and effects whatsoever, after payment of all his just debts and funeral and testamentary expenses, he gave and bequeathed the same unto his said dear wife, *Sarah Stevens*, her executors, administrators, and assigns absolutely. The will

1834.
COATES
v.
STEVENS.

then contained a power of appointing new trustees, with the consent and approbation of *Sarah Stevens*; and the testator appointed his said wife, *Sarah Stevens*, and the said *John Montague* and *H. R. Briggs*, joint executrix and executors of his said will.

The testator died in *August*, 1832, leaving his wife and several of his grandchildren surviving him. The trustees declined to act in the trusts of the will, or as executors. The wife proved the will, and took upon herself the administration of the testator's estate.

The bill was filed by the grandchildren, acting by *George Coates*, their father and next friend, against *Sarah Stevens*, the trustees, and the Bank of *England*. After stating the will and death of the testator, it alleged that *Sarah Stevens* had possessed herself of the personal estate, and paid the greater part of the testator's debts and funeral expenses. That at the death of the said testator, there was standing in the name of himself and the said *Sarah Stevens*, in the Bank books, a sum of 1900*l.* Reduced 3*l. per Cent.* Bank Annuities; that she had already transferred and sold out a portion thereof, and applied the produce thereof to her own purposes; but that a sum of 1800*l.*, of the same stock, continued to stand in the names of the said *Silas Stevens* and *Sarah Stevens*. That the said *Sarah Stevens* was bound by the directions of the will to make up, out of the other parts of the estate and effects of the said testator, the sum of 2200*l.*, Reduced 3*l. per Cent.* Bank Annuities, applicable to the trusts and purposes of the will; that she had not only neglected to do so, but had applied to the Governor and Company of the Bank of *England* to transfer and sell the said sum of 1800*l.*, Reduced 3*l. per Cent.* Bank Annuities, and that she threatened and intended to receive the money to arise from such sale, and transfer and apply the same to her own purposes, unless restrained, &c.

1834.

COATES
v.
STEVENS.

The bill likewise contained allegations as to the advanced age of *Sarah Stevens*, her incapacity to manage her affairs, &c., and prayed that the trusts of the will might be declared; that the defendant *Sarah Stevens* might be restrained by injunction from transferring and selling the said sum of 1800*l.* stock; that a receiver might be appointed; that the defendant *Sarah Stevens* might be compelled to consent to the appointment of new trustees, to be approved by the master; that the said 1800*l.* stock might be transferred into their names; that all proper deeds might be executed, and that the said sum of 2200*l.*, Reduced 3*l. per Cent.* Bank Annuities, might be directed to be made up out of the other parts of the estate of the testator.

The defendant, *Sarah Stevens*, by her answer, admitted the will of the testator, and that he died possessed of the leasehold and other personal property therein mentioned. She likewise stated that he was, at the time of his will and death, seised of a small freehold and copyhold property in the county of *Oxford*, out of which she submitted she was entitled to dower or freebench. That, upon, or shortly after the marriage with her late husband, many years ago, her husband became possessed of considerable personal estate, and that he employed the same, or the proceeds thereof, in his trade or business of an oil and colour-man; and that out of the profits of his said business, he from time to time, during his life, invested divers sums of money in the purchase of Bank Annuities, in the joint names of himself and of the defendant, his wife. That, her said late husband having discovered that a sum of 200*l.* Bank Annuities had been invested, and was standing in the name of defendant, he had shortly afterwards procured the same sum of Bank Annuities to be transferred into the joint names of himself and of defendant, his wife. That

1834.
COATES
v.
STEVENS.

divers sums, parts of the Bank Annuities, so invested in and transferred into the joint names aforesaid, were sold out on several occasions during the life of the said *Silas Stevens*. That her said late husband, on none of the said occasions, could be prevailed on to sell, and never in fact sold, the said Bank Annuities, or any part thereof, without obtaining the concurrence of the defendant in such sale; and that he sometimes insisted on the defendant's being a party to the transfer thereof. That by means of such investments, sales, and transfers as aforesaid, she admitted there was standing in the joint names of the said testator *Silas Stevens*, and of defendant his wife, in the books of the Governor and Company of the Bank of *England*, at the time of the death of the said testator, a sum of 1900*l.*; Reduced 3*l. per Cent.* Bank Annuities; but she submitted and insisted, that, under the circumstances stated, the said sum of 1900*l.* Bank Annuities became, upon the death of her said late husband, her absolute property. She admitted that she had sold out 100*l.*, part thereof, and applied the produce to the payment of the testator's testamentary and funeral expenses, and the residue to her own use, but this she submitted she had a right to do. She also submitted, that she was not bound, by the directions contained in the said will or otherwise, to make up, out of the other parts of the estate and effects of the said testator, or any part thereof, the sum of 2200*l.*, Reduced 3*l. per Cent.* Bank Annuities, or any other sum; but that the sum ought, if at all, to be made up out of the said freehold or copyhold hereditaments, and all other the real estates, if any, of her said late husband's, after setting out or allowing for defendant's dower or freebench therein; and also out of his personal estate and effects, if any, not specifically bequeathed by his said will, and not required for the payment of his debts. She further stated, that she believed that *George Silas Coates*, one of the grandchildren, had pos-

essed himself of and still retained the testator's furniture, plate, linen, &c., and had never accounted for the same, and likewise the title deeds of the said several real estates; and she alleged, that, in *January* last, he had removed her from the house in *Windmill Street*, where she had theretofore resided, and had taken possession of the premises.

An injunction having been obtained *ex parte*, founded on the several statements made in the bill, a motion was now made to dissolve that injunction.

Mr. *Simpkinson*, and Mr. *H. W. Busk*, for the motion. —At the time of the marriage of *Sarah Stevens* with the testator, she was entitled to a considerable personal estate; that estate came to the husband, and he employed it with his other monies in his trade of oil and colour-man. From the profits so made he invested certain sums in the purchase of Bank Annuities; these he purchased in the joint names of himself and his wife. Occasionally certain portions of the stock so purchased were sold out; upon these occasions he required her concurrence, and sometimes even required her to join in the sale. Is there any thing then to take this out of the general rule, and to do away with that *prima facie* case, on which the wife has a right to insist? It has been decided over and over again, that the purchase of stock by the husband in the joint names of himself and his wife, is a gift to the wife in case she survive the husband. One of the earliest cases on this subject is that of *Kingdom v. Bridges* (a). That was the case of a purchase by the husband, in the joint names of himself and wife, of a walk in a chase; and the Court held, that, the wife surviving, it was a gift to the wife. Again, in *Christ's Hospital v. Bridgin* (b), the Court of Chancery held the same doctrine as to money lent by the husband

1834.

COATES
v.
STEVENS

(a) 2 Vern. 67.

(b) 2 Vern. 683.

1834.

COATES
v.
STEVENA.

on mortgages and bonds. Again, *Back v. Andrews* (a) was the case of a purchase of copyholds in the joint names of husband and wife. *Lanoy v. Lanoy* (b) was the case of a purchase of stock. Another case of the purchase of stock is that of *Wilde v. Wilde* (c), in which Lord *Eldon* said, the purchase of stock by the husband in the joint names of himself and his wife, was *prima facie* a gift to her, in the event of her surviving, unless evidence was produced of contemporaneous acts shewing a contrary intention. From a manuscript note of this case, it appears that this opinion of Lord *Eldon* was delivered on a motion either to obtain or dissolve an injunction. Then comes the case of *Dummer v. Pitcher* (d), very recently decided. All these cases establish that it is a gift to the wife, unless it can be shewn that the husband entertained a contrary intention at the time when the act was done. That must be shewn by contemporaneous evidence alone; and the mere fact of his bequeathing, is no evidence of the husband's intention at the time of the purchase. The utmost extent to which the plaintiffs can go is, that it will put the wife to her election. Joint purchases are, perhaps, more common in the cases of father and son than of husband and wife. In many of these cases the father devises away property which he has taken in the joint names of himself and son, and the devise goes for nothing. *Dyer v. Dyer* (e), *Finch v. Finch* (f). It is expressly laid down in *Finch v. Finch*, that the will of the father in these cases cannot be looked to as evidence of what he meant by the act of purchase. The same principles are to be met with in *Murless v. Franklin* (g), and *Crabb v. Crabb* (h).

(a) Prec. Cha. 1.

(b) Sel. Ca. Ch. 48; S. C. 4 Vin. Abr. 114, pl. 38.

(c) Roper's Husb. and Wife, Jacob's Ed. Vol. 1, p. 54.

(d) 5 Sim. 35; 2 Myl. & K. 262.

(e) 1 P. W. 112, n.

(f) 15 Ves. 43.

(g) 1 Swanst. 13.

(h) 1 Myl. & K. 520.

In the present case, there is no allegation of contemporaneous acts, either in the bill or the affidavits, by which it may be inferred, that, at the time of the joint purchase, the husband intended the wife to be a trustee for him. [The *Lord Chief Baron*.—How can this case be distinguished from that in the Vice-Chancellor's Court? There the husband took upon himself to dispose of funded property by his will. That is the same as the present case. The words here, indeed, are more definite. There the bequest was not sufficiently specific to raise a case of election; here it is. There are circumstances, too, in this case, which there were not in the other, tending to rebut the notion that the wife should be a trustee. The husband always asked for her assent and concurrence. It appears to me that the only question is, whether I should retain possession of the property till the hearing, or decide the case now.]

1834.
COATES
v.
STEVENS.

Mr. *Jervis*, and Mr. *James Stewart*, *contrà*.—Your Lordship will not dissolve the injunction now, except upon a very clear case. The testator, by a will made nine years before his death, bequeaths the sum of 2200*l.* stock, standing in the joint names of himself and wife, to trustees upon certain trusts. He describes the stock as *his property*; and adds, that, in case he shall not have that precise sum standing in *his* name at the time of his decease, the trustees are to make it up out of his other effects. In both clauses he speaks of the same sum. This case, therefore, is distinguishable from that of *Dummer v. Pitcher*; there, as the Vice-Chancellor observed, the testator was not the owner of the stock in question; here the testator describes himself as distinctly possessed of the stock which he bequeaths; he describes how it stands, and provides for the precise sum to be made up. At all events the injunction should be continued till the hearing, in order that the material facts of the case may be proved. It does

1834.

COATES
v.
STEVENS.

not appear clearly what part of the money invested in the trade was the wife's property; nor is it sufficiently proved that the husband required the wife's concurrence on every transfer of the stock. We may be able to prove contemporaneous acts of the testator at the time of investment, shewing that it was a trust in the wife. This which he calls his property may have been invested on the day he made his will. We may be able to prove this by a broker; and this and other circumstances may amount to such contemporaneous acts. [The *Lord Chief Baron*.—You suggest that something may be proved which is directly denied by the answer. You knew the fact of the joint purchase, and might have been prepared with evidence to shew a trust in the wife. The *onus* of proving the trust lay upon you.] The point of election might be argued at the hearing. [The *Lord Chief Baron*.—She has made her election; she must give up the rest of the property; and I wish to know whether she is in possession of the rents of any of the property.]

Simpkinson, in reply.—It appears by the answer, that she was in possession of the rents and profits of the freehold cottage, and resided in another of the houses till *January* last, when she was removed; that she has received none of the rents of the leasehold, and that they have sold the furniture.

THE LORD CHIEF BARON.—I am satisfied upon the affidavits and the answer, that the defendant *Sarah Stevens* is not in possession of any other part of the testator's property; therefore, there is no reason why the property in question should be retained to answer the purposes of justice. I am of opinion, upon all the decisions, that this is the absolute property of the defendant. The transfers were made to the husband and wife in their joint names, and

there is no evidence to shew that these transfers were coupled with any trust. I am of opinion, therefore, that, as it is her absolute property, and she has made her election, the injunction must be dissolved. There is no suggestion by the plaintiffs that they can prove any fact beyond what is already in evidence; and, even if they could, they would have no ground for the application, inasmuch as they are not taken by surprise, by any thing contained in the answer. She has not insisted on any right to which she was not properly entitled; there was, therefore, no ground for the injunction, and the plaintiffs ought not to have made the application. Dissolve the injunction, with costs.

1834.

COATES

v.

STEVENS.

ANONYMOUS.

Nov. 20th.

THIS was a creditor's suit; and an application was made by motion, that an infant heir might be directed to join in a conveyance to a purchaser, under the stat. 1 *Will.* 4, c. 47, s. 11. *Sed per Curiam*.—Similar applications have been usually made by petition. That is the safest and most correct way.

An application under the 1 *Will.* 4, c. 47, s. 11, for an infant heir or devisee to convey, must be made by petition, and not by motion.

Ex parte PASMORE.—In the Matter of the LONDON
BRIDGE ACTS.

Nov. 22nd.

THE petitioner in this case was tenant for life of certain freehold estates, situate in *Cannon Street* and *Clement's Lane*, in the city of *London*. The premises had been purchased by the mayor, commonalty, and citizens of the city

Tenant for life of lands sold under the provisions of the *London Bridge Act* (10 *Geo.* 4, c. cxxxvi.) is not entitled to his

costs out of the fund arising from the sale.

1834.

Ex parte
PASHMORE.

of *London*, under the provisions of the 10 *Geo.* 4, c. cxxxvi., and other acts passed for improving the approaches to *London Bridge*. Upon the occasion of this purchase the petitioner had employed a surveyor of eminence to meet the city surveyor to value the premises. They valued them at 4866*l.*, and the same sum was accordingly paid by the purchasers into the Bank of *England*, in the name of the Accountant-general of this Court, and placed to his account, as directed by the act. The petition prayed a reference to the Master to take an account of the costs, charges, and expenses which the petitioner had been put to in having the premises surveyed and valued, and to tax the costs of the petitioner in making out the title, and respecting the conveyance of the estate, and also the costs of this petition, and that the Accountant-general might be directed out of the said 4866*l.*, so standing in his name, to pay such costs, to be certified by the Master; and that the Accountant-general might lay out and invest the residue in his name, to the same account, &c.

The 10 *Geo.* 4, c. cxxxvi., s. 30, in substance enacts, that, if any money shall be agreed or awarded to be paid for any tenements or hereditaments purchased by virtue of this act, which shall belong to any body politic, corporate, or collegiate, or any trustee or trustees, or other person or persons who have no power to give a valid receipt for the same, or to sell and convey the same premises, otherwise than by virtue of this act, such money, if amounting to 200*l.*, after deduction (if necessary) of the costs of impanelling a jury, shall be paid into the Bank of *England*, in the name of the Accountant-general of the Court of *Exchequer*, &c., and shall, when so paid in, be applied, under the direction of the said Court, to be signified by an order made upon petition, in the purchase or redemption of the land-tax, or discharge of any debt or debts, or such other incumbrances as the said Court shall an-

thorize to be paid, affecting the same tenements or hereditaments; or where such money shall not be so applied, then the same shall be laid out and invested, under the like direction and approbation of the said Court, in the purchase of other tenements or hereditaments, to be conveyed and settled to the like uses, &c. as the tenements or hereditaments which shall be purchased as aforesaid, stoodsettled or limited; and, in the meantime, and until such purchase, the said money shall be invested by the Accountant-general in his name, in the purchase of 3*l.* *per Cent.* Consols, the dividends and annual produce thereof to be paid to the persons interested.

1834.

Ex parte
PASMORE.

Mr. *Spurrier*, in support of the petition.—The Court has power, under this act, to award the costs in question to the tenant for life. Upon sale of the premises the fund to be invested in the Accountant-general's name is the whole fund which remains, after deducting the expenses of managing it. There ought, therefore, to be a reference to the Master to see what are the expenses incurred. It is said that Lord Chief Baron *Alexander* decided the contrary; but that case must have turned upon the particular circumstances. It is clearly within the jurisdiction of the Court to manage the fund for the benefit of all parties interested. Suppose it to be otherwise, and that this tenant for life had only the income arising from these houses, the consequence might be that she would lose the whole of it. Besides, under such a construction, what becomes of the interest of those in remainder? In the administration of funds in general, Courts of equity are in the habit of regulating the expenses attending such administration. This act cannot contemplate that the Court should have power at its discretion to lay out and invest the money, but not the means of paying the incidental costs. The Court cannot have the power of managing the fund with-

1834.

Ex parte
PASMORE.

out the power of carrying that management into full effect.

Mr. *Wood*, for the mayor and corporation of the city of *London*, observed, that the costs prayed for by this petition, must fall upon the tenant for life; that this had arisen from an omission in the act, and that it had been so held by former Judges.

ALDERSON, B.—In the present question I consider myself bound by the high authority of Lord Chief Baron *Alexander*; but I also rely on the terms of the act of Parliament, independently of that authority. In construing this act we ought to see what it is over which I have jurisdiction. Now the jurisdiction is given to the Court by the 30th section. That section enacts, that the money agreed or awarded to be paid for the tenements to be purchased by virtue of this act, shall, under the circumstances therein mentioned, be paid into this Court; and that, upon petition to this Court, the money so paid in shall be applied, under its direction, in the discharge “of any debt or debts, or such other incumbrances,” as the Court shall authorize to be paid, affecting the same tenements. Here, the word “debts” means debts for which the estate is pledged; the word “incumbrances” means incumbrances on the estate itself. The act then goes on to say, that, where such money shall not be so applied, the same shall be laid out, under the like directions of the Court, in the purchase of other tenements, to be conveyed to the same or the like uses to which the original tenements stood limited; and that, in the meantime, “the said money” shall be invested in the funds. I think, therefore, that “the said money” means the money agreed or awarded to be paid, as mentioned at the beginning of this section. Then I find no power given to the Court, if the parties disagree, to settle the amount of the money to be

so invested ; and no power given to a jury to give compensation for expenses, such as that now claimed between the tenant for life and others interested in remainder. No doubt this is a great defect in the act of Parliament, but I am obliged to conform to it. I am obliged to administer the law, and not to make it.

1834.

Ex parte
PASMORE.

Ex parte LAYFIELD.—In the Matter of the LONDON
BRIDGE ACTS.

Nov. 22nd.

THE petitioners, *William and Thomas Layfield*, were trustees under the marriage settlement of *R. T. Dole*, and *Mary Ann*, his wife, under which settlement certain premises in *Sherborn Lane*, in the city of *London*, were conveyed to the petitioners and their heirs, upon trust to pay the rents, &c. to *R. T. Dole*, for his life ; and, after his death, to *Mary Ann Dole*, for her life ; and, after the death of the survivor of the said *R. T. Dole* and *Mary Ann Dole*, to sell and dispose of the same ; and, out of the monies to arise from the sale, in the first place, to pay the costs and expenses attending the same ; and then to invest the surplus in the funds, or at interest upon government or real securities, and to stand possessed of such monies, upon certain trusts, for the benefit of the children of *R. T. Dole*, and *Mary Ann*, his wife.

Trustees for sale of lands in settlement, which lands are afterwards sold under the provisions of the *London Bridge Act* (10 Geo. 4, c. cxxxvi.), are entitled to their costs out of the corpus of the fund arising from the sale.

The scite of the above-mentioned premises being required for the approach to *London Bridge*, they were accordingly valued by a jury at 2020*l.*, which sum was paid into the Bank of *England* by the mayor and commonalty of the city of *London*, in the name of the Accountant-general, as directed by the act. The petition alleged, that surveyors' and other professional charges, incurred by the petitioners in and about the valuation of the said property, tracing out the title, and conducting the inquiry

1834.

Ex parte
LAYFIELD.

before the jury, amounted in the whole to the sum of 50*l.* 3*s.* 6*d.* over and beyond the charges paid by the mayor and commonalty and citizens; and it prayed a reference to the Master to tax the costs of the petitioners incident to this petition, as between solicitor and client; and that, thereupon, the Accountant-general might be directed to pay the petitioners such costs, together with the said sum of 50*l.* 3*s.* 6*d.*, out of the before-mentioned sum of 2020*l.*, and that the residue might be invested in the funds upon the trusts of the settlement.

Mr. *Ching*, in support of the petition.—Trustees are always entitled to take their charges out of the trust property; that is to say, out of the *corpus* of the property; for that is for the benefit of all parties. They are never paid out of the dividends or rents. In this case the trustees ought to have been paid out of the purchase-money before it was brought into Court; however, they are still entitled to be paid out of the principal. Why should they be made to wait till the children come of age? The children must ultimately pay these costs, when the money is paid out of Court; there is no reason, therefore, why the trustees should not be paid immediately. Such parties as are *sui juris* consent. These charges are always considered as incumbrances upon property; and the act expressly mentions “incumbrances.” The question of trustees has never yet come before the Court.

Mr. *Simpkinson*, Mr. *Chandless*, and Mr. *W. Paynter*, for the tenants for life, did not press their claim for costs after the decision in *Ex parte Pasmore*(*a*); but they urged that the trustees had an equitable lien upon this money for the amount of their costs. The act of Parliament extends to “incumbrances,” the most general word affecting

(*a*) Ante, p. 75.

property. All costs are incumbrances. In truth, the property was not out of the trustees until after the costs were incurred, so that their claim arose antecedently to the act. Besides, their costs are provided for by the settlement. After the death of husband and wife, they might sell, and apply the money in the first place to the payment of their costs. They could not do this during the lifetime of the husband and wife; but the act removes this difficulty, and authorizes them to sell before the time limited by the settlement. Are they to be deprived of their costs because the act of Parliament gives them an earlier opportunity of doing a legal act? It is, in fact, a sale in execution of the trusts of the settlement.

1834.

Ex parte
LAYFIELD.

ALDERSON, B.—Upon inquiry I cannot learn that any application of this nature has ever been made on behalf of trustees. Finding, therefore, no precedent to the contrary, and thinking that the justice of the case requires that I should make the order, I will direct the expenses of the trustees to be deducted out of the fund in Court. According to the rules of equity, the trustees would ultimately be entitled to be paid out of the *corpus* of the fund itself. Under the circumstances, therefore, of this particular case, I see no reason why they should not have immediately what they are entitled to ultimately.

Dec. 2nd.

Petition granted.

1834.

Nov. 26, 29.

PRICE v. ASSHETON.

In a correspondence between lessor and lessee respecting the granting of a new lease to the lessee, the latter having spoken of the *renewal* of the old lease, the lessor did not object to this expression, but adverted to other topics connected with the subject. On a bill filed for the specific performance of the agreement for renewal alleged to be contained in these letters: *Held*, that they were so far evidence of such agreement, as to warrant the continuance of an injunction against an action of ejectment brought by the lessor against the lessee.

Where an agreement to renew a lease contains no stipulation as to the term of its duration, it is implied that the new lease shall be of the same duration as the old.

One having a power to lease at the most improved rent agrees to grant

a lease at a rent to be estimated at a fair valuation, without reference to improvements made by the lessee, but these improvements are deemed part of the consideration for the lease. *Quære* whether such a lease is consistent with the terms of the power?

THE plaintiff was lessee of two houses, one situate in *Cannon Street*, the other in *St. Lawrence Pountney Lane*, under two leases for twenty-one years, each dated the 13th *November*, 1812, originally granted to one *Atkinson*. In the year 1816, the defendant, *William Assheton*, by virtue of his marriage settlement, became tenant for life of the premises, with a power to lease for thirty-one years, at the most improved rent. The leases held by the plaintiff having nearly expired, the present bill was filed by him for the specific performance of an alleged agreement by the defendant to renew these leases, and for an injunction to restrain two actions of ejectment. The bill alleged, that, in the year 1822 the plaintiff applied to the defendant for a reduction of his rent, or that he might be permitted to make certain alterations, in order to enable him to underlet part of the premises. That, in consequence of this proposal, the defendant sent a surveyor to the premises, to ascertain the nature of the improvements proposed; but he subsequently wrote a letter, observing that the alterations would be of no ultimate advantage to him, and declining to grant an extension of the term. That the plaintiff then wrote a letter to the defendant, containing a farther explanation of the proposed alterations; and that the defendant, on the 10th *June*, 1823, called on the plaintiff, when the plaintiff explained to him the alterations he intended to make, and the probable costs. That at this interview the defendant declined to reduce the rents, but agreed to grant a new lease of the two houses and premises for the further term of twenty-one years, to commence from the expiration of the leases before mentioned, at such

rents as the premises should upon a fair valuation be worth at the expiration of the leases; but not to exceed the former rents, nor calculating any thing by reason of the improvements; and that, upon such occasion, the defendant promised to the plaintiff to sign an agreement in writing, to the effect of the verbal agreement, and to forward it to the plaintiff next day. The bill then alleged, that, in consequence of the defendant's promise at this interview, he, on the following day, wrote and sent to the plaintiff the following letter, dated 11th *June*, 1823:—

1834.
PRICE
v.
ASSHETON.

“ Sir,—From the conference we had yesterday relative to the houses which you have an unexpired lease of, in *Cannon Street* and *Lawrence Pountney Lane*, it seems you are desirous of altering the premises in *Cannon Street*, so as to enable you to carry on your professional engagements with more advantage; and to make which alteration, you inform me, will not cost less than 280*l.* or 300*l.* Under this supposition, I wish you to understand that, at the expiration of the lease granted to Mr. *Atkinson*, I shall not demand a higher rent of you than is at present paid; and moreover, if at that time it should be considered, upon a fair valuation, that the premises are not worth the rent that they are now let for, I should not object to grant you a lease at a reduced rent, not taking advantage of such improvements made by you from this time. I must, however, beg to observe, it has frequently occurred that Mr. *Gell* has written to me respecting the difficulty of obtaining the rent at the time usually paid by Mr. *Atkinson*, though never demanded till some time after it became due. I shall, therefore, under this arrangement between us, expect that all the covenants of Mr. *Atkinson's* lease will be more strictly attended to. Hoping this will meet your views on the subject, I remain, Sir, your obedient, humble servant,

“ *Wm. Assheton, jun.*”

1834.
 PRICE
 v.
 ASSHETON.

The bill further alleged, that the plaintiff, not considering the defendant's letter sufficiently explanatory as to both the houses, he, on the 13th of *June*, sent to the defendant the following letter:—

“ *Cannon Street, 13th June, 1823.*

“ Sir,—I received your letter of the 11th, for which I beg to return you my best thanks. I perceive you only mention alterations in *Cannon Street*, whereas I stated to you that part of them were to the house at the corner of *Lawrence Pountney Lane* (the front windows, &c.), both of which houses communicate together in part by an opening through the party wall. You will much oblige me, therefore, by dropping me a line explanatory of this, stating whether you intend to include in the sum mentioned the alterations and improvements of both houses, as well as the renewal of both leases, on the terms you mentioned. I am, Sir, your most obedient,

“ *R. Assheton, Esq.*

“ *R. Price.*”

In answer to which, the bill stated that the plaintiff received the following letter:—

“ *2, Keppel Street, June 13th, 1823.*

“ Sir,—The alterations you mentioned to me it was your wish and intention to make, included those both of the house in *Cannon Street* and *Lawrence Pountney Lane*, and of course my intention of granting a lease to you would apply equally to both houses. I am, Sir, your obedient humble servant,

“ *Wm. Assheton, jun.*”

After stating the foregoing correspondence, the bill contained this averment:—“ And the said letters so written by said defendant, *Wm. Assheton*, were and contained a complete binding agreement on the part of the said defendant for the said renewal of said leases to plaintiff.”

The bill then alleged that the plaintiff, relying on the said agreement being duly performed on the part of the defendant, immediately commenced making the alterations; that he greatly improved the premises, and expended in such alterations and improvements a sum of money exceeding the sum of 300*l.*, and that he thereupon gave to the defendant due notice of such alterations and improvements. That the defendant afterwards refused to renew the leases.

1834.
 PRICE
 v.
 ASSHETON.

The defendant, by his answer, admitted the interview between him and the plaintiff stated in the bill, but denied that on that occasion he had promised to grant the plaintiff a new lease for the term of twenty-one years, or any other term. He admitted the two letters alleged by the bill to have been sent by him to the plaintiff; but he neither admitted nor denied the intermediate letter sent to him by the plaintiff (a). He said that he had been advised by his solicitors, that he could not, consistently with his power of leasing, grant a new lease, pursuant to his letter of the 11th of *June*, 1823. He stated, that neither he nor his solicitors had received any regular notice of the alterations, though he believed the plaintiff had mentioned them to his solicitors. He believed the alterations were slight, and that, so far from being beneficial, they had greatly injured the premises. He denied that the plaintiff had paid all the rent due in respect of the said leases; alleging, on the contrary, that the plaintiff had been very irregular in his payments, and that in *July*, 1827, the rent was obliged to be raised by distress, and that the rent due at *Michaelmas* last was still unpaid. He then alleged, that, in 1828, the plaintiff had been discharged under the Insolvent Act; that no mention was made in his schedule of the agreement or contract of which he now sought the

(a) This letter was therefore proved upon the present occasion by the affidavit of the plaintiff. See *Taggart v. Hewlett*, 1 Mer. 499.

1834.

PRICE
v.
ASHSTON.

specific performance; but that, on the contrary, he had stated in his schedule, and sworn before the Commissioners, that he had assigned all his interest in the premises to his mother, *Margaret Price*, for certain sums of money, which she had advanced to him at different times, for the purposes of his business. He submitted, that, if the agreement was such as this Court would execute, the assignees under the Insolvent Act ought to be made parties to the suit.

An injunction *nisi* having been obtained to stay the proceedings at law,

Mr. *Simpkinson* and Mr. *Rogers* now shewed cause against dissolving the injunction.—This is a bill for the specific performance of the agreement stated in the bill. The plaintiff, however, is not bound to abide by the written agreement only; he may give evidence of a parol agreement, if consistent with the statement made in the bill. *Spurrier v. Fitzgerald* (a), *Gregory v. Mighell* (b), *Clinan v. Cooke* (c). The Court, therefore, will not interfere in this stage of the cause to deprive the plaintiff of his equitable relief. *Attwood v. Barham* (d). By the terms of the agreement, the lease was to be renewed or the rent ascertained at a “fair valuation.” This expression is not too vague for the Court to act upon in decreeing a specific performance; for, in *Guskarth v. Lord Lowther* (e), a contract for sale at a fair valuation was executed. The authority of this case was recognised in *Milnes v. Gery* (f), where, however, the bill was dismissed because the valuation was to be by two persons, one to be chosen by each party, and the Court had no jurisdiction to have the value ascertained in any other way than the parties themselves agreed. The same principles

(a) 6 Ves. 548.

(b) 18 Ves. 328.

(c) 1 Sch. & Lef. 22.

(d) 2 Russ. 186.

(e) 12 Ves. 107.

(f) 14 Ves. 400.

were acknowledged in *Blundell v. Brettargh* (a), and *Gregory v. Mighell* (b). But, independently of any dispute as to the wording of the agreement, there is in this case evidence of part performance. There is on the face of the answer a sufficient admission that the plaintiff laid out money upon the premises. It is admitted, that, upon his application for a new lease, the plaintiff pointed out to the defendant the intended alterations and improvements. In the letter of *June*, 1823, the defendant refers to these alterations. It is stated in the bill, and not denied by the answer, that the plaintiff laid out more than 300*l.* upon the premises; at all events, there is no allegation in the answer or in the correspondence, that the money was not laid out. It is stated in the bill, and admitted by the answer, that notice of the improvements was given to the defendant or his agents; and there was no complaint of the alterations not having been made. What the defendant has said in his answer, though evasive, is perfectly consistent with the fact of the alterations having been made. He doth not know whether the plaintiff expended a large sum of money, exceeding 300*l.* He hath been informed that the plaintiff hath made some alterations, but he believes them to be slight, and that in so doing he hath greatly injured the premises. There is nothing inconsistent in this with the case made by the plaintiff. There was clearly an agreement between the parties, and on the strength of it the plaintiff laid out his money. The only thing which can reasonably be contended against the agreement is, that the term for which it is made is not distinctly stated in the written part of it. But in *Hyde v. Skinner* (c), the lessor covenanted to renew the lease, at the request of the lessee, within the term; the lessee did not request, but his executors re-

1834.
PRICE
v.
ASSHETON.

(a) 17 Ves. 232.

(b) 18 Ves. 328.

(c) 2 P. W. 196. See the ob-

servation of Lord *Hardwicke* on this case, 3 Atk. 88.

1834.
 PRICE
 v.
 ASSHETON.

quested, within the term; and Lord *Macclesfield* compelled the lessor to renew. It is true that Lord *Macclesfield* said that the request of the executors for a fifty-year lease was too much; for it might have been as well for one hundred or two hundred years; but, he added, "the usual term for leasing being for twenty-one years, let the defendant demise the premises to the plaintiff for twenty-one years, or for any lesser term, as the plaintiff shall elect." Now, the parol agreement upon which we proceed, and to evidence which we produce the letters, was for the term of twenty-one years. Supposing even we were driven to proceed upon the letters as a written agreement, they at all events contain the word *renew*, and that must be applied to the subject-matter. We go farther; for, if the Court shall be satisfied that the money has been laid out by the plaintiff, it will, notwithstanding the omission of the term, adopt the course of Lord *Redesdale*, in *Clinan v. Cooke* (a). That was a stronger case than this. There the bill proceeded on a written agreement, and the term was omitted. One of the objections was, that the term not being stated, the agreement was imperfect and could not be executed, and the Court refused to decree the specific performance of it. Lord *Redesdale*, however, went on the consideration that there was no part performance; for, if there were, he would have thought it his duty to direct inquiries; and he went very fully into the question of part performance. The other points urged by the defendant are immaterial:—*first*, that he has no power to grant the lease, though admitted to be a tenant for life with power of leasing for thirty-one years; *second*, that the plaintiff having formerly taken the benefit of the Insolvent Act, his assignees should have been made parties. This question your Lordship decided by overruling the plea (b).

(a) 1 Sch. & Lef. 22. (b) See the 2nd Vol. of Younge's Reports.

Mr. *James, contra*.—The frame of the bill excludes the new features which are sought to be introduced by the plaintiff's counsel. It states two letters of the defendant, and adds, that they "were and contained a complete and binding agreement of the said defendant." The bill, therefore, proceeds upon these two letters only, and no testimony *aliunde* can be admitted to shew the nature of the agreement. *Birce v. Bletchley* (a). Now these letters contain no promise on the part of the defendant to *renew* the former lease, but to grant a *new* lease, to be at a new and reduced rent. All the argument, therefore, derived from the case of *Hyde v. Skinner*, is superfluous. Moreover, though the defendant speaks of granting a new lease, he specifies no term; and there is no case in which it has been held that an agreement to grant a lease for an uncertain term is such an agreement as the Court will enforce. *Gordon v. Trevelyan* (b) is decisive of this point. In that case the plaintiff *Gordon* had been a tenant of the defendant *Trevelyan*. Upon a new valuation being made of the farms, the plaintiff applied to the defendant to have a lease on the same plan with those usually granted to his other tenants. To this the defendant acceded by letter, in the following terms:—"As you desire a lease on the same plan with my other tenants, you shall certainly have one." Upon this the plaintiff claimed a lease for fourteen years, alleging that to be the usual term of the defendant's leases. He accordingly brought his bill for the specific performance of the agreement, and obtained an injunction to stay proceedings at law. The Court, however, dissolved the injunction, being of opinion, that, to constitute an agreement for a lease, the term and conditions should either be actually expressed, or the treaty should bear some reference by which they might be ascertained; and that otherwise it is not an agreement of which a Court of

1834.
PRICE
v.
ASSHETON.

(a) 6 Madd. 17.

(b) 1 Price, 64.

1834.
 PRICE
 &
 ASHETON.

equity can decree a specific performance. *Clinan v. Cooke* (a) and *Harnett v. Yielding* (b) are authorities to the same effect. The latter case likewise decides, that equity will not decree specific performance against a party not competent to execute. Now, it is inconsistent with the defendant's power of leasing to grant a lease upon the terms demanded by the plaintiff. [The *Lord Chief Baron*.—The defendant says in his letter—"I should not object to grant you a lease at a reduced rent, not taking advantage of such improvements made by you from this time." It may be a question whether taking the rent without reference to the improvements is not inconsistent with the power. If it be worth the tenant's while to pay rent, and also to make improvements, it shews that the rent taken by the landlord is not (according to the terms of the power) the most improved rent.] Lastly, the insolvency of the plaintiff will prevent his receiving the assistance of a Court of equity. *Buckland v. Hall* (c), *Crosbie v. Tooke* (d), *Morgan v. Rhodes* (e). [The *Lord Chief Baron*.—The insolvency of the intended lessee is clearly an objection to the specific performance of a contract for a lease. There is no dispute as to the general doctrine; but how does that apply to the circumstances of this case?] A decree for specific performance is not *ex debito justitiæ*, but arises from the indulgence of a Court of equity, and is to be granted with great caution. That is a doctrine which your Lordship has held in many important cases. This is not a common insolvency. The plaintiff has, through the medium of his insolvency, repudiated the contract. He has shewn, on oath, that he has no interest in the premises. In 1828 he became insolvent, and in his examination before the Commissioners he denied that

(a) 1 Sch. & L. 22.

(b) 2 Sch. & L. 549.

(c) 8 Ves. 91.

(d) 1 Myl. & K. 431.

(e) Id. 435.

he had any interest in the premises. In his schedule, likewise, he stated that he had assigned the premises for a valuable consideration to his mother, *Margaret Price*. Either, therefore, there was no agreement at all which could be enforced, or, if there were, he suppressed it from his assignees. If he suppressed it, can he ask the Court to enforce an agreement so suppressed? [The *Lord Chief Baron*.—Suppose a man is insolvent, and five or six years afterwards is in affluent circumstances, will that bar him of the relief sought by this bill?] It is apprehended it would. But, at all events, the circumstances of this plaintiff in 1834 are not better than they were in 1828. The defendant has several times distrained for rent, and the *Michaelmas* rent is now due: these are breaches of covenant which will prevent the Court from continuing the injunction, or enforcing the agreement for the new lease. *Thompson v. Guyon* (a).

1834.
PRICE
v.
ASSHETON.

The LORD CHIEF BARON.—This is a bill filed for the specific performance of an agreement for the renewal of a lease, and the question is, whether the injunction shall be dissolved, and the possession in consequence changed; or whether the injunction shall be continued to the hearing. It appears, on the pleadings, that an agreement for a lease was entered into between the parties, and a certain sum of money was stipulated to be laid out in repairs on the premises; and it appears, from certain letters, that, in consideration of the sum to be laid out, some further lease of the same description should be granted. But then it is objected, that the injunction must be dissolved, because it does not appear what are to be the terms of the intended lease, particularly the terms in point of duration. Now, in looking to the pleadings, there appears to me to be evidence to shew that the lease agreed to be given was

Nov. 29th.

(a) 5 Sim. 65.

1834.

PRICE

v.

ASSHETON.

intended to be a renewed lease; that is, a renewal of the old lease; and, therefore, in point of duration, coinciding with the former lease. The evidence is not conclusive, but there is evidence arising out of the correspondence between the parties. In the first place, it is not probable if a party stipulate to lay out a sum of money, and a lease is to be granted in consideration of such sum, that some understanding should not take place as to the extent and duration of this new interest. But it further appears, that a letter was written by the plaintiff to the defendant, dated the 13th of *June*, 1823, in which the plaintiff speaks of the intended renewal. An answer is returned to this letter by the defendant, and he does not object that he never intended a renewal, but adverts to other topics. This, therefore, is evidence that it was intended to be a renewed lease; that is to say, a lease of the same duration as the former lease. In addition, reference was continually made to the covenants of the former lease, and Messrs. *Baker* and *Hodgson*, the solicitors of the defendant, were requested to take measures for granting a new lease. They do not object to that mode of putting the case, but say that it is premature to enter into the consideration of a new lease until the expiration of the former. I cannot say that this is not evidence leading to the conclusion that it was intended there should be a renewal of the former lease; I cannot, therefore, on this objection, at least, consider myself justified in dissolving the injunction.

But then it is said that the lease agreed to be granted was inconsistent with the power of leasing in the lessor. Now that power, as I find it set out in the answer, is a power to lease for thirty-one years; but the intended lease was only for twenty-one years: therefore, as far as concerns the duration, it was within the terms of the power. But it is said that, according to the power, the best improved rent is to be reserved; while, according to the stipulations in the agreement, the rent was to be fixed by valu-

ers at a fair valuation, with reference to the improvements to be made, and the rent was in no event to exceed the rent paid under the former lease. Now, if, at the time of valuation, the new rent should be less than the rent originally stipulated to be paid, then it would not be the best improved rent; but this state of things must depend upon the valuation. This, therefore, is not an argument which can be used in support of the motion for dissolving the injunction. But then another question of some nicety arises, namely, whether, although money was to be laid out by the plaintiff, and the rent to be estimated by the valuers, without reference to the money so to be laid out, that is within the terms of the power? That may be a question of some nicety, to be decided on the hearing of the case, when the terms of the power are before the Court. *Prima facie*, a rent so reserved is not an improved rent; but here it was stipulated that the improvements should be made by the tenant, in consideration of the new lease. It is difficult, therefore, to say, whether that can be considered as an infringement of the power.

1834.
PRICE
v.
ASSHETON.

Then there is this further objection, namely, the insolvency of the plaintiff, or rather his discharge under the Insolvent Debtors' Act; but it appears that his discharge took place seven years ago, and there is nothing in the answer which shews that the debts have not all been discharged. That, therefore, cannot be urged as an objection in this stage of the cause. There are other objections arising out of former breaches of covenants in the existing lease, and neglect and delay in the payment of rent. It is unnecessary, however, to enter into this part of the defence; I have considered it with attention, and am of opinion, that those objections would not justify me in dissolving the injunction.

Injunction continued. The parties entering into terms as to paying the rent into Court, withdrawing notices, &c.

1834.

Nov. 26,
Dec. 1, Jan. 28.

Where the time for answering has expired, and an attachment is duly taken out, the defendant cannot demur; and where the demurrer is filed on the same day on which the attachment issues, the latter has the priority, without regard to hours.

TAYLOR v. SHEPPARD.

MOTION.—That the writ of attachment issued against the defendants in this cause for want of an answer—the order for an injunction bearing date the 21st day of *November* instant—and the writ of injunction issued thereupon, may be set aside, and discharged with costs; and that the demurrer filed by the said defendants may be received, and set down for argument on the next day for arguing demurrers.

The bill in this case, which was to restrain proceedings at law against the plaintiffs, for the amount of a bill of exchange, and goods sold and delivered, was filed on *Thursday*, the 13th of *November* last. No answer or other pleadings being filed on the 20th, the plaintiffs' solicitor, as appeared by his affidavit, on the morning of the 21st obtained and issued an attachment against the defendants. Having so done, he immediately proceeded to *Westminster*, and, being informed that no answer had been sworn at the sitting of the Court, caused the motion for an injunction to stay proceedings at law to be entered. When this entry was made, he was not aware that any steps had been taken by the defendants.

In support of the present motion the affidavit of the clerk to the defendants' clerk in court was read. He stated that, on the morning of *Friday*, the 21st of *November*, and not later than five minutes after nine o'clock, as the deponent verily believed, he filed and delivered over to the plaintiffs' clerk in court a demurrer by all the defendants to the plaintiffs' bill. That, before the office closed on the 20th, he informed Mr. *F. Milne*, one of the side clerks, that he should have a demurrer to deliver over in this cause before the sitting of the Court the next morning. That, at the time he gave such information, he had the demurrer in his possession, but he did not then

file the same, having understood from the solicitor of the defendants that they did not wish the same to be filed sooner than was necessary to prevent an injunction; and he having no doubt but that the same being filed before the sitting of the Court, would be in time. The solicitor of the defendants likewise stated by his affidavit that, when he entered an appearance for the defendants, he was informed by his clerk in court that, to prevent an injunction, the defendants must file an answer or demurrer before the sitting of the Court on the 21st instant.

1834.
 TAYLOR
 &
 SHEPPARD.

Mr. Kindersley, in support of the motion.—The attachment cannot issue till the Court sits. The common injunction issues only for two reasons: either because the defendant has taken out an order for time to answer, or because, not having taken such an order for time, there is no defence on the record on the part of the defendant, and, therefore, the plaintiffs are entitled to attach. Any defence on the record, whether demurrer, or plea, or answer, will equally prevent an attachment. This also is the admitted practice, that, if an answer is filed in the morning, before the sitting of the Court, then, even if the attachment be issued at the opening of the office on the same day, that attachment goes for nothing; nay, even if an answer is not on the file, but is sworn before one of the Barons, before the sitting of the Court, then the attachment, under the same circumstances, is a nullity. On what principle, then, can it be contended that, if a demurrer or plea be put in, the same course is not to be pursued? The same rules must apply equally to one mode of defence as to another.

Mr. Simpkinson, and *Mr. Kenyon Parker*, *contrà*.—The object of the defendants was delay; for it appears that the clerk to the defendants' clerk in court had the demurrer in his possession on the 20th: why, then, was it

1834.

TAYLOR

v.

SHEPPARD.

not filed on that day? They have gone a step too far, and have placed themselves in contempt. By the seventh general rule, every defendant shall put in his answer within eight days after his appearance and the bill filed; and, in default of putting in his answer as aforesaid, an attachment is to be awarded against him. One of these days is the day of appearance (a). By the ninth general rule, every defendant in contempt must pay the costs of his contempt before his answer can be accepted, and no defendant in contempt shall put in a demurrer or dilatory plea. Here the defendants are in contempt, and cannot demur. *Mellor v. Hall* (b). [The Lord Chief Baron.—In that case the demurrer was filed after the issuing of the attachment. Here they say that the demurrer was on the file at five minutes after nine o'clock, and before the sitting of the Court, which was before the attachment.] The attachment having been properly taken out relates to the first moment it might have issued, and is, therefore, regular. *Whitehouse v. Hickman* (c), *Ibbotson v. Booth* (d).

Kindersley, in reply, contended that the attachment was irregular, because it could not be considered as an attachment for want of a defence on the record until the sitting of the Court, before which time the demurrer was filed. But the Court held the attachment regular. He was then proceeding to move that, notwithstanding the regularity of the attachment, the demurrer might be received, and set down for argument; when, upon the objection of the plaintiffs' counsel, the Court called upon him to shew whether he could make an application of this nature until he had cleared his contempt?

Kindersley.—Upon payment of the costs of the con-

(a) 1 Fowler, 222. (b) 2 Sim. & Stu. 321. (c) 1 Sim. & Stu. 102.
(d) *Id.* 103.

tempt, the defendant is at liberty, even upon the present motion, to make the application. In *Blunden v. Terry*, Minute Book, *Easter Term*, 1803, the following motion is entered:—"Mr. *Hollist*—that the attachment sealed by the plaintiff, at the expiration of the eight days after the delivery of the bill, may be set aside, this being a country cause; and that the plaintiff may accept the demurrer filed for the defendant." It must be admitted that no order was granted on this motion; but immediately afterwards appear the following entries in the same cause:—"Mr. *Trower*—for an injunction on an attachment for want of answer. Ordered." "Mr. *Hollist*—that the plaintiff may accept the defendant's demurrer on clearing his contempt. Ordered." This is an authority to shew that the Court, under circumstances, will allow the defendant to clear his contempt without putting him to file his answer; and also, in a case like the present, without putting him to the expense of making a new motion for that purpose.

1834.
TAYLOR
v.
SHEPPARD.

The LORD CHIEF BARON.—Upon the first point, the case which was first cited in argument appears to be against you; but, at all events, to obtain the object which you now seek, it appears that in strictness you must come again before the Court. The present motion is specifically to get rid of an attachment for irregularity; this, therefore, must in strictness be disposed of before you can make the other application, which must be done by a distinct motion. There was a distinct motion for that purpose in the case in the minute book. The plaintiffs insist upon the objection, and therefore this motion must be dismissed with costs.

On a subsequent day, Mr. *Kindersley*, having obtained leave, and given notice for that purpose, moved that the defendants, notwithstanding the attachment, might file

Dec. 1st.

1834.

TAYLOR
&
SHEPPARD.

their demurrer, and that the demurrer might be received and set down for argument; the defendants having tendered and submitted to pay the costs of the contempt.

Mr. *Simpkinson*, *contrà*.—The only mode which a defendant has of clearing his contempt is by filing an answer and tendering the costs of the contempt. While in contempt he is not at liberty to be heard on the merits of the case. *Vowles v. Young* (a). In *Chancery* this rule is carried so far, that, if the costs are refused by the plaintiffs, the defendant must get an order to clear his contempt. *Green v. Thomson* (b). That is not necessary in this Court, but the defendant must, at all events, put in his answer. [The *Lord Chief Baron*.—In this case the defendants never intended to answer, but to demur. They were, by accident, too late. You say they must answer. If that be so, it is a very hard measure of justice. They do not want to go into the merits.] By the general rule of this Court no party in contempt can demur. There is no case to the contrary, except the case cited from the minute book, which was a motion of course. The defendants, however, may have the full benefit of the demurrer by their answer.

Mr. *Kindersley*, in reply.—The general rule that a defendant in contempt cannot be heard on the merits is not disputed. But here the motion is actually in reference to the contempt. If the argument on the other side were to prevail, you could not even move to discharge the contempt. The Court may deviate from its own rules under special circumstances; and the rule in question has been relaxed on several occasions. *Beames. Ord.* 178; *Gilb. For. Rom.* 71; *Wy. Prac. Reg.* 165; *Harvey v. Matthew* (c), *Barnes v. Wilson* (d). In the *Attorney-General v. Mayor of Carlisle* (e), the defendants not having put

(a) 9 Ves. 172.

(b) 1 Sim. & Stu. 121.

(c) 1 Dick. 30.

(d) 1 Russ. & Myl. 1.

(e) 2 Sim. 427.

in an answer, the plaintiffs issued an attachment and *dis-
tringas* against them; that, according to the general rule,
would have prevented them from demurring; afterwards,
under an arrangement between the parties, an order for
time was substituted for the attachment; the defendants
then applied for leave, notwithstanding the order for time,
to put in a general demurrer; this was opposed by the
plaintiffs, but the Vice-Chancellor granted the motion, ob-
serving that he could not conceive what harm would arise
from it. Now, had the attachment been allowed to stand,
the defendants would clearly have been in contempt, and
the arrangement of the parties, in substituting for the at-
tachment the order for time, could make no difference.

1834.

TAYLOR
v.
SHEPPARD.

The LORD CHIEF BARON, after some consideration,
said, that he thought there was no case on the authority
of which he could grant this motion. Besides, it appeared
on the face of the proceedings that the parties who de-
murred might have filed the demurrer at an earlier period.
The delay had taken place because the defendants did
not wish that it should be filed earlier than was necessary
to prevent an injunction. Under these circumstances the
motion must be refused with costs.

Jan. 28th.

THE injunction and attachment having issued against
the defendants for want of an answer, on the 21st of No-
vember, they, on the 13th of the following month, put in
a joint and several answer. To this the plaintiffs filed ex-
ceptions. The defendants submitted to answer these ex-

An active step
taken in a cause
by defendants
in contempt is
not rendered
valid by the
subsequent ten-
der of the costs
of the contempt.
Where, there-

fore, defendants in contempt, having put in answers which were excepted to, obtained the pre-
vious order, and afterwards tendered the costs of the contempt, the order was discharged for ir-
regularity.

Where exceptions are taken to separate answers which are substantially the same, one previous
order is sufficient.

Semble, that defendant obtaining the previous order, need not also take out an order *nisi* for
dissolving the injunction.

1835.

TAYLOR
v.
SHEPPARD.

ceptions, but afterwards separated in their defences: one of them, *Richard Calvert Sheppard*, putting in a separate further answer; the two others, a joint and several further answer. The plaintiffs took fresh exceptions to these answers, and obtained two rules to argue these exceptions; but afterwards being advised of the sufficiency of the answer of *R. C. Sheppard*, they abandoned the rule which they had obtained against him. The defendants, however, refused to accept the abandonment, and obtained the previous order.

A motion was now made on behalf of the plaintiffs, to discharge this order for irregularity. In support of the motion the affidavit of the plaintiffs' solicitor was read, stating his information and belief that the defendants had not, since they had submitted to answer the first exceptions, tendered or paid to the plaintiffs' clerk in court, or their agents, the costs of the contempt occasioned by the attachment, and consequently that they were in contempt at the time of obtaining that order; moreover, that they had not obtained any order *nisi* to dissolve the injunction since the filing of the aforesaid further answers.

For the defendants, the affidavit of their solicitor was read, stating that the separate further answer of *R. C. Sheppard* arose from the circumstance of his being in *London*, and the other defendants being in the country, at the time it was put in; and that it was so put in to avoid expense; and that the further answers were precisely the same, except in the alterations made necessary by the separation. The affidavit also stated that the deponent had, on the 26th of *November*, tendered to the plaintiffs' solicitor 1*l.* 10*s.* for the costs of the attachment, which he had refused to receive; and that the deponent had likewise this day tendered the same costs to the plaintiffs' clerk in court, but that he had refused to receive the same.

Mr. *Simpkinson*, and Mr. *Kenyon Parker*, for the motion.—When this order was obtained, the defendants were in contempt. If the party tendering costs does not eventually perform the duty for which the process of costs was awarded, the other party may proceed as before. The answer being insufficient, and therefore amounting to no answer, the plaintiffs may take up their old process, as if no tender of costs had been made. But, even if they were entitled to an order of this nature at all, they have not obtained it in the regular manner. For, *first*, they should have obtained two previous orders; *Eastwood v. Dobree* (a), *Allanson v. Moorsom* (b); and, *secondly*, they should have obtained two orders *nisi* to dissolve the injunction. Now they have obtained only one previous order, and no order *nisi* at all.

1835.
TAYLOR
v.
SHEPPARD.

Mr. *Kindersley*, and Mr. *John Romilly*, *contrà*.—It must be conceded that the defendants, in submitting to answer the first exceptions, treated their original answer as insufficient, and remained for a time in contempt. But they have, since, put in further answers, and have tendered the costs of the contempt. The costs were not tendered till after the previous order was obtained; but the contempt is substantially removed by filing the further answer; not by payment of costs. The costs are merely accessory to the principal act, and relate back to the time of filing the further answer. They have, therefore, done all they can to clear the contempt. It is said there should have been two previous orders. No doubt, if there are different sets of exceptions, there must be different orders. On that ground *Eastwood v. Dobree* was decided. So in *Allanson v. Moorsom*, there were two distinct sets of exceptions, and two orders of reference were required. In many cases that is necessary, because one answer may be

(a) 1 Y. & J. 508.

(b) 2 S. & S. 478.

1835.

TAYLOR
v.
SHEPPARD.

good, the other bad. Here the answers *mutatis nominibus* are the same. The objection that no orders *nisi* were obtained is untenable. The object of an order *nisi* to dissolve an injunction is to give the plaintiff time to look into the answer, to see that it is sufficient, and to enable him to determine whether he will shew cause on the merits or by exceptions. If that object is obtained in another manner, the order *nisi* may be dispensed with. *Lacy v. Hornby* (a). Now the previous order is sufficient for that purpose. It gives the plaintiff notice that, in case the exceptions are overruled, he must be prepared to shew cause on the merits.

The LORD CHIEF BARON (b).—The difficulty in the way of the defendants is, that they did not tender the costs of the contempt till it was too late. I do not think the authorities shew that two previous orders were necessary. The question as to the order *nisi* may be more doubtful. But I think that the defendants, not having tendered the costs before they obtained the order in question, must be considered to have been in contempt. I regret that they should suffer by a mere point of form; but, nevertheless, the practice of the Court must be observed in all cases. There would be no rules of practice at all, if we were to advert to minute circumstances for the purpose of bending those rules. I must adhere, therefore, to the regulation that a party must get rid of his contempt before he can take any active step in the cause. The obtaining the previous order is, emphatically, a step taken by the defendants. If they had done any thing in resisting a motion brought against them, my decision might possibly have been otherwise: but this is an original step which they have taken for their own security. There is one ground which I should be glad to yield to, if any thing would

(a) 2 Ves. & B. 291.

(b) Lord Abinger.

warrant me in so doing—and that has been very ingeniously put—namely, that the tender of costs related back to the time of filing the answer. One would like, however, to see some authority for that proposition. In the absence of any such authority, I cannot say that a tender made the day before yesterday related back to some antecedent period, so as to clear the contempt. The order was obtained before the defendants had any right to it, and must therefore be discharged, and, I am afraid, with costs.

The order as to costs was afterwards suspended.

1835.

TAYLOR
v.
SHEPPARD.

SPARKE v. MONTRIOU.

Nov. 27th,
Dec. 1st, 23rd.

IN this case two motions were made for the production of deeds and papers admitted by the answers of the defendants *Montriou* and *Carvick* respectively. The application in each case was, that the defendant may be ordered to leave in the hands of his clerk in court the several deeds, documents, papers, and writings, admitted by his several answers filed in this cause, or the schedules thereto respectively, to be in his possession, custody, or power, and particularly certain indentures, &c.; and that the said several deeds, &c. may be produced at the hearing of this cause, or that the said defendant may be ordered to produce the said several deeds, &c. to the said plaintiff's solicitors, and to the examiner, for the purpose of proving the same, and at the hearing of this cause.

According to the statement in the bill, *Richard Moore*

Where a defendant appears to be a bare trustee for the plaintiff, and offers no explanation to the contrary, the Court will compel the production of deeds and documents admitted, by his answer, to be in his possession.

The Court will not, upon motion before the hearing, compel an incumbrancer to produce at the hearing deeds which are admitted by his answer, but which are his title deeds, even

though the plaintiff may have an interest in such deeds; but, under circumstances, the Court will direct them to be proved before the examiner.

The mere circumstance of a defendant incorporating a deed in his answer, whether by referring to the schedule or otherwise, is not a ground for compelling its production, if in other respects such compulsion would be inequitable.

1834.

SPARKE
v.
MONTRIOU.

was indebted to *Peter Firmin* in the sum of 1200*l.*, secured by a judgment entered up in *Trinity* Term, 1806. In 1810, *Moore* mortgaged certain real estates to *Exekiel Sparke*, for 1200*l.* Afterwards, *Moore* contracted to sell other estates, of very considerable extent and value, to *W. L. Ogden*, for which *Ogden* was to pay a large deposit. *Ogden* declining to pay the deposit without some security, *Sparke*, who was a friend of *Moore*, assigned his mortgage to *Ogden* for that purpose, under an agreement that when the purchase was completed, the security should be re-assigned. The deposit was accordingly paid. *Ogden* afterwards granted an annuity to one *Allen*, and assigned *Sparke's* mortgage to secure the annuity. *Allen* assigned to the defendant *Carvick*. In the meantime *Sparke* had obtained an assignment of *Firmin's* judgment. Before the completion of the contract for the sale of the real property, *Ogden* died, and all the interest of *Moore* in the premises was conveyed to the defendant *Montriou* upon trust, to carry the contract into execution with *Ogden's* representatives, or abandon it upon their receiving the difference of the purchase-money. *Montriou* entered into an agreement with *Ogden's* representatives to rescind the contract, which was done. *Moore* and *Sparke* both died. *Moore's* real estates were purchased by *Hart Logan*. The bill was filed by the widow and personal representative of *Sparke* against the defendants *Montriou* and *Carvick*, *Willoughby Moore*, the son and heir-at-law of *Moore*, and *Hart Logan*; praying for the benefit of the judgment, and of *Sparke's* mortgage deed; that *Carvick's* annuity might be paid off out of the purchase-money due from *Hart Logan*; that the lands covered with *Sparke's* mortgage might be reconveyed as a security for his mortgage money; for an account of what was due to him for principal and interest; and payment of his debt.

Mr. *Wakefield* now moved for the production of the

deeds by the defendant *Montriau*, observing that *Montriau* was a trustee for the plaintiff. The application was made in the alternative; either that the deeds might be produced at the hearing, or that they might be produced before the examiner, for the purpose of being proved. Proof of the deeds was what the plaintiff mainly required.

1834.
 SPARKE
 v.
 MONTRIOU.

Mr. *O. Anderdon*, *contrà*.—The bill contains no charge as to the possession of deeds and documents, and no prayer for their production. The schedule is an answer to a different bill, the bill having been changed by amendment. The deeds are the title deeds of the defendant himself. Some authority ought to be cited for the proposition, that because a person sets forth a schedule of deeds, they are, therefore, to be produced. If *A.* has title deeds in which *B.* has an interest, *B.* ought to file his bill for their production, and not proceed by interlocutory application. Suppose one party states certain deeds as part of his own case, is the other party entitled to their production upon the mere allegation that the former party is a trustee?

Mr. *Wakefield*, in reply.—*Moore* was a trustee for *Sparke* to the extent of *Sparke's* mortgage; and *Moore's* interest being now vested in *Montriau*, the latter is a trustee for the plaintiff. The contract between *Moore* and *Ogden's* representatives having been rescinded, is no reason why *Sparke's* representative should be deprived of his mortgage money. *Sparke* likewise was possessed of a judgment overriding all the securities. The plaintiff, therefore, has a *primá facie* case. The object of the motion is, that the deeds may be produced at the hearing, or proved before the examiner. The plaintiff is satisfied with the alternative: proof of the deeds is all that we require. The principle by which the Court is guided in ordering the production of deeds is laid down by Lord

1834.

SPARKE
v.
MONTRIOU.

Eldon, in *Evans v. Richard* (a). It depends on whether the deeds are by reference incorporated with the answer, and made part of it. Here the deeds are sufficiently incorporated with the answer. Those of the 11th and 12th *February*, 1811, the conveyance to *Ogden*, are set out and referred to in these terms:—"As by the said indentures, reference being thereunto had, will more fully and at large appear." The conveyance to *Montriau*, and other deeds, are comprised in the schedule; and the schedule is expressly referred to in the answer. The answers shew that the plaintiff has an interest in those deeds; and the Court will not presume that the defendant has inserted in his schedule deeds in which the plaintiff has no interest. In *Church v. Barclay* (b), the defendant *Barclay* admitted the possession of certain deeds; the cause came on to be heard, and the plaintiff failed. On appeal, the plaintiff had *prima facie* no case for the relief he sought, and yet production of the deeds was ordered. In *Unsworth v. Woodcock* (c) the defendant denied the plaintiff's case from beginning to end; yet that made no difference, and the order was made.

The LORD CHIEF BARON was of opinion, that the defendant had by his reference to the deeds made them part of his answer, and that he was *prima facie* bound to produce them. There might be reasons for not producing them; but if so, it was incumbent on the defendant to shew what those reasons were.

The order made was, that the defendant *Montriau* should furnish the plaintiff's solicitors with the names, descriptions, and residences, of the attesting witnesses to the deeds, and that the deeds should be produced before the examiner to be proved, and at the hearing of the cause.

(a) 1 Swanst. 7. (b) 16 Ves. 435. (c) 3 Madd. 432.

Mr. *Wakefield* then moved for the production or the proof of the deeds admitted by the answer of the defendant *Carvick*.—Upon the occasion of *Ogden's* assigning *Sparke's* mortgage to *Allen* as a security for the annuity granted to *Allen*, the mortgage deeds were deposited with *Allen*. Upon *Allen's* assignment, they were deposited with *Carvick*. These and other deeds are mentioned and referred to in the body of the answer, in the terms “but for his greater certainty, &c.” The plaintiff is entitled to their production. They afford no defence to the defendant; they form no part of the defendant's case, and it cannot be for the benefit of the defendant to resist the application. On the other hand, proof of the assignment of *Sparke's* mortgage, and of the contract which existed between *Ogden* and *Sparke*, is material to the plaintiff; and proof of those deeds is all that is required. The defendant, by referring to them, has made them part of his answer, and is bound to produce them.

1834.
SPARKE
v.
MONTRIOU.

Mr. *Wigram*, *contra*.—The plaintiff is in the situation of a mortgagor, who files his bill for redemption, and insists that he has a right to call on the mortgagee to produce his deeds. The bill prays that the defendant *Carvick* may be paid what is due to him; and now, before the hearing of the cause, he is to be compelled to produce his deeds. The answer to such an application is, that he is not bound by any rule of law to disclose his securities before he is paid. In a case before Lord *Kenyon*, where a similar application was made, his Lordship said he would advise the mortgagee to put his deeds into a box, and sit upon the box till the mortgage money was actually put into his hands (a). In *Buden v. Dore* (b), Lord *Hardwicke* said, he would not compel a discovery of the deeds and

(a) See the observations of Lord *Eldon*, in *Postlethwaite v. Blythe*, 2 Swan. 256.
(b) 2 Ves. sen. 445.

1834.

SPARKE
v.
MONTRIOU.

writings of the defendant's title, though, if there was any charge in the bill, that the defendant had in his power deeds and writings of the plaintiff's title, an answer must be given to such a charge. In *Wilson v. Foster* (a), the demurrer was allowed, because the deed related to the defendant's title, and the plaintiffs had no interest in it. Here, it is true, the plaintiff has an interest in the deeds, but subject to the defendant's annuity. The same doctrine is now held in the Court of *Chancery*, though formerly that Court was more severe on defendants than this Court, and used to compel them to produce deeds in cases where this Court would not. *Tyler v. Drayton* (b), *Bolton v. Corporation of Liverpool* (c). The notice of motion extends to six different documents. The bill contains no charge that these documents are essential to the plaintiff's title; they are, therefore, not referred to by the defendant in answer to such a charge, nor is there any thing in the answer distinguishing one from another, but they are stated as part of his own title. There is no rule that, because a deed is stated or referred to in the answer, therefore it must be produced. The reference is necessary for the defendant; for if the statement in the answer was not coupled with a reference, the answer would be read without qualification. *Cox v. Allingham* (d). [The *Lord Chief Baron*.—The reservation is merely in favour of the party who makes it. He states his belief of the document; but for greater certainty, refers to it when produced.]

Mr. *Wakefield*, in reply.—*Carvick* is not a mortgagee, he is the grantee of an annuity charged upon real estate. A mortgagee has an absolute estate at law, and until redemp-

(a) 1 Younge, 280.

(b) 2 S. & S. 309.

(c) 1 Mylne & Keen, 88.

(d) Jacob, 337.

1834.
 SPARKE
 v.
 MONTRIOU.

tion, the mortgagor is out of his estate. But in the case of an annuity, the estate, subject to the annuity, is the grantor's. *Ogden* was not a mortgagee, as between *Sparke* and *Carvick*. [The *Lord Chief Baron*.—The legal estate is in *Ogden*, and he hands over the title deeds as a security to *Allen*.] For the purpose only of securing the annuity. *Allen* never could foreclose. [The *Lord Chief Baron*.—May not the assignee of that security, supposing there was no assignment of the mortgage, make use of *Ogden's* name?] Not as against *Sparke*. He is a trustee for *Sparke*, subject to the annuity. If I assign a legal estate to secure an annuity, the annuitant is trustee for me, subject to the annuity. *Ogden* is repaid. I am, therefore, entitled to say, give me back my mortgage, subject to the annuity. The assignee cannot go beyond the annuity; if he became a mortgagee, it was only a mortgage for that particular purpose; he cannot treat it as a mortgage for his own purposes. Besides, it has never been determined that a mortgagee is not to produce his deeds for the purposes of proof. In the case in *Vesey*, the deeds made out the defendant's title, in which the plaintiff had no interest. The same remark applies to the other cases. But has it ever been decided that a plaintiff having an interest, and not even looking into the deed, is not entitled to have it proved? In *Cox v. Allingham* the deed was lost. Suppose the defendant had said he believed the deed as set forth in the bill to be true, but for his greater certainty referred to a copy of it in the schedule to his answer, would not the Court have said produce the copy, and allow it to be proved? In *Tyler v. Drayton* all the deeds but those disputed were produced. Here the plaintiff seeks the proof of that which is common title between her and this defendant; and the proof is absolutely necessary as against the other defendants. It is said that the bill contains no charge as to the deed being

1834.

SPARKE
v.
MONTRIOU.

in the power or custody of the defendant. Now the deeds are set out in the bill, and there is a charge that they are fraudulent and void against the plaintiff, or that the said defendant *Montriou* ought to be declared a trustee of the premises for the plaintiff.

Dec. 23rd.

The LORD CHIEF BARON, after taking time to consider the case, made the following order:—That the deeds should be produced before the examiner, for the purpose of being proved, but without prejudice to the question whether or not the defendant should be bound to produce them at the hearing: with respect to which it was to be considered as if the deeds were not proved, but as if the witnesses were present at the hearing. The deeds to be in Court at the hearing.

Nov. 28th.
Dec. 1st, 23rd.

HARWOOD v. FISHER.

Where the first husband of a woman entitled to a legacy of 600*l.*, chargeable, in default of personalty, on the testator's real estate, verbally agreed with the three devisees of the real estate to sell the legacy to them for 200*l.* a piece, but received the considera-

GEORGE FISHER devised his real estates, subject to an annuity to his wife for her life, to his three sons *John*, *George*, and *William*, as tenants in common in fee. He bequeathed his personal property to *W. Pallet* and *E. W. Elam*, whom he appointed his executors upon trust, after payment of his debts, to raise 600*l.* a piece for his two daughters; the residue he bequeathed amongst his children equally. In case of deficiency in his personal assets, he charged his real estates with the payment of the two sums to be raised for his daughters' fortunes.

tion from one only of the devisees, taking interest on the 400*l.* due from the two others:—*Held*, that to the extent of 400*l.* this was not a reduction of the legacy into possession; and that to a suit instituted by the woman and her second husband to recover what was due on the legacy, the representatives of the first husband were not necessary parties.

Where facts are stated in the answer which are not contradicted, and which, if true, would lead to a material alteration in the frame of the suit, the Court will, on motion, permit the minutes of the decree to be amended, with a view to ascertain the truth of those facts.

Mary, one of the testator's daughters, married, first, *Francis Phillips*, and secondly, the plaintiff *Harwood*. The present bill was filed by the plaintiff and his wife against the devisees, the surviving personal representatives of the testator, and the husband of the testator's other daughter who was deceased, praying for the establishment of the will, for an account, &c., and for payment of what should be found due in respect of the said legacy bequeathed to *Mary Harwood*.

1834.
HARWOOD
v.
FISHER.

It appeared that *Francis Phillips* had received from *John Fisher* 200*l.* in part payment of this legacy. The account given of this transaction in the answer of the devisees was this :—that *Phillips* having met with some difficulty in getting the legacy from the executors, one of them having become bankrupt, it was verbally agreed between *Phillips* and the three devisees, that they should each pay *Phillips* 200*l.* for the legacy to his wife, and for her share of the residue, upon the understanding that *Phillips* should allow these sums to remain at interest at 5*l. per cent. per annum*, and not call for payment of the principal, unless he was in urgent want of it; the devisees to take upon themselves the risk of recovering the legacy and residue. The answer then went on to state, that *John Fisher* paid his 200*l.* to *Phillips*, but that *George* and *William* continued to pay interest for their respective debts to *Phillips* during his lifetime, and after his decease, and during the widowhood of *Mary Harwood*, to the executors of *Phillips*. The answer then set forth the will of *Phillips*, by which he bequeathed 400*l.* to his executors, upon certain trusts, for the benefit of his widow and sons; and the defendants alleged their belief that the sum of 400*l.* so bequeathed was the sum remaining due from *George* and *William Fisher*.

Mr. *Simpkinson* and Mr. *Gresley*, for the plaintiffs.

1834.

HARWOOD
v.
FISHER.

Mr. *Geldart*, for the defendants, the devisees, objected that the representatives of *Phillips* ought to have been made parties to the suit, and that in their absence, the Court would not decree payment of the 400*l.* to the plaintiffs, without directing an inquiry as to the circumstances of the agreement.

Mr. *Simpkinson*, in reply.—The inquiry asked for will only incumber the suit. There was no purchase of the interest which *Phillips* had in right of his wife. There was no consideration moving to *Phillips* and his wife. The money to be paid was not secured by bond or any other personal security. This was a mere agreement to assign. An actual assignment by a husband of his wife's choses in action is a reduction into possession, but not a mere agreement to assign. [The *Lord Chief Baron*.—The devisees said to *Phillips*, if you will allow us to stand in your place against the personal estate, we will pay you such and such sums. Is not that a consideration? It may be inadequate; but is it not a consideration? They are interested in the personal estate being made available, and are to see to the payment of the legacy.] They were equally entitled against the personal estate, without any such agreement.

Dec. 1st.

The LORD CHIEF BARON, after taking time to peruse the answer, was of opinion that there was no reduction into possession by *Phillips* in his lifetime, and therefore that his representatives were not necessary parties to the suit, and the decree must be as prayed.

Dec. 23rd.

On a subsequent day, Mr. *Geldart* moved that the minutes of the decree might be amended, by inserting a declaration, that the Master, on the application of any party, might be at liberty to state special circumstances

concerning the legacy bequeathed to *Mary Harwood*. He stated that he had affidavits to prove that a promissory note was given to *Phillips* by *George* and *William Fisher*, to secure the 400*l*. He contended, however, that, without the aid of the affidavits, there was enough on the face of the answer to warrant the application, and to induce the Court to interfere. A statement in the answer, particularly when there is no contradictory evidence, is sufficient to ground a reference to the Master. It is the ordinary practice in the *Exchequer* for the Master to report special circumstances. *Seton on Decrees*, pp. 12, 24.

1834.
 HARWOOD
 v.
 FISHER.

Mr. *Simpkinson*, *contra*, contended that the course which had been taken was contrary to all practice; it was rehearing the cause upon affidavit.

The LORD CHIEF BARON at first inclined to the opinion that the only course was to apply for a rehearing. His Lordship, however, ultimately acceded to the application; observing, that if the evidence turned out in favour of the defendants, he ought not to proceed with the suit in its present shape; if it turned out against them, they would have to pay the costs.

Motion granted.

See *Blount v. Bestland*, 5 Ves. 515.

1834.

Nov. 29th.

Dec. 1st.

1835.

Jan. 15th.

Where exceptions are taken to the Master's certificate, with a general allegation that the Master is wrong in "all the particulars" complained of; then, if one of the exceptions is overruled, all must be overruled; but the exceptant will be allowed to amend, on payment of costs.

Prolixity in an answer is impertinence; but it is a question of degree. Therefore, in a bill for an account of money transactions between the plaintiff and the defendant, it having been required that the defendant should set forth in a schedule a variety of minute particulars concerning certain securities which were alleged to have been deposited with him:—
Held, that it was not an act of impertinence to annex to the answer a schedule with columns.

GOMPERTZ v. BEST.

THE answer in this case had been referred for scandal and impertinence. The Master certified the answer not to be scandalous or impertinent. The plaintiff took exceptions to the Master's certificate, "For that the said Master hath, in and by his said certificate, certified that the said defendant's answer to the said complainant's bill is not in any particular scandalous or impertinent; whereas the said Master ought to have certified that the passage contained in the said answer, commencing &c., and that the passage contained in the said answer, commencing &c. are scandalous and impertinent; and that the passage contained in the said answer, commencing &c. is impertinent, &c." and so on. "In all which particulars the said complainant doth except to the said Master's certificate, and humbly appeals therefrom to the judgment of this honourable Court."

The exceptions coming on to be argued, the Court was of opinion that the Master was right upon the first point.

Mr. *Elderton*, for the defendant, then submitted that the exceptions must be overruled altogether. Where the exception includes several distinct matters, but is in fact general, and the report appears right in any one instance, the exception must be overruled. *Hodges v. Salomons* (a), *Green v. Weaver* (b), *Wagstaff v. Bryan* (c), *Pearson v. Knapp* (d).

Mr. *Wakefield*, *contrà*.—The words, "In all which particulars, &c." are words of course annexed to all excep-

(a) 1 Cox, 249.

(b) 1 Sim. 404.

(c) 1 Russ. & M. 30.

(d) 1 Mylne & K. 312.

tions. In *Pearson v. Knapp*, the Master of the Rolls dwells on the words in the frame of the exception itself; not on the words at the end of it. In this case there is an allegation in each passage of the exceptions that the Master is wrong. It is alleged that the Master did so and so, whereas he ought to have done the contrary. The exceptions do not conclude with a general averment that the Master is wrong in all the particulars; but each passage is concluded with a particular averment to that effect. In *Russell v. Dyke* (a), the exceptions, which were in the same form as the present, were amended in Court by adding the words "or some of them."

1834.
GOMPERTZ
v.
BEST.

THE LORD CHIEF BARON.—I consider myself bound by the decisions, though I confess I do not see distinctly the reason of them, or why the exceptions should not be taken *reddendo singula singulis*. But, as the objection is only one of form, I shall allow the plaintiff to amend his exceptions, upon payment of costs.

Exceptions overruled; the plaintiff to be at liberty to amend them, by inserting in the body of the exceptions the following words:—
"Whereas the said Master ought to have certified that, in the particulars hereinafter mentioned, or some or one of them, the said answer is either scandalous and impertinent, or impertinent, that is to say—"

THE plaintiff having made his amendment, the exceptions came on again for argument. One ground of exception

1835.
Jan. 15th.

(a) Not reported.

1835.

GOMPERTZ

v.
BEST.

was, that the Master had not reported one of the schedules to the answer to be impertinent. The bill had been filed for an account of money transactions between the plaintiff and defendant, and contained a great variety of charges relative to certain securities, deposited with the defendant in the course of these transactions, as collateral securities. The interrogating part of the bill, which was founded on these charges, was very minute; requiring the defendant to set forth when and on what occasions, and in whose presence, these securities were deposited; what was their nature and amount; whether they had subsequently been exchanged for others, made productive, or been parted with by the defendant, and been subsequently re-deposited; and, if parted with, when, and to whom, and for what consideration, &c. &c. The defendant, in answer to these several queries, set forth the information required in a schedule with columns.

Mr. *Wakefield*, in support of the exception.—There may be impertinence in manner as well as impertinence in matter. Prolixity is impertinence in manner. *Slack v. Evans* (a). Here, by putting the schedule in columns, fourteen words only go to a folio, which occasions very great additional expense.

Mr. *Elderton*, *contra*.—The bill alleges every species of fraud against the defendant, and therefore a full answer was necessary for his defence. The columns are stated as shortly as possible; it is the clearest mode for the purposes of the Court, and it has been required by the bill. The expense has not been occasioned by the form of the schedule, but by the mode of computation adopted in the office with respect to columns in schedules. In *Slack v.*

(a) 7 Price, 278, n.

1835.

GOMPERTZ

v.

BEST.

Evans, the defendant set out tradesmen's bills, which was clearly impertinent. In *Parker v. Fairlie* (a), the answer was very long, stating the very language of certain affidavits and certificates, on which the defendant relied. The Master thought them, stated at this length, to be impertinent; but Sir *John Leach* held otherwise, observing, that he could not think it useless on the part of the defendant to set them forth *in hæc verba*. *Lowe v. Williams* (b), and *Bally v. Williams* (c), are authorities to the same effect. The latter case completely meets the present point.

Mr. *Wakefield*, in reply.—We complain of the manner, not of the quantity of matter. The cases cited have no application, because in them there was verbal materiality, which is not so here. The opinions of the other Equity Judges were contrary to that of Lord *Eldon*, who thought prolixity impertinence. In some cases, as matters of account, it is necessary to use columns; here it is not necessary. The defendant might as well set forth letters in columns, with their date, signature, &c., in separate columns. There is no occasion to give information in this manner.

The LORD CHIEF BARON (d).—I think the exception must be overruled. I am sorry that there should have been a difference of opinion amongst judges upon a subject in which they were much better versed than I can be. I am disposed to agree with Lord *Eldon* in thinking prolixity impertinence; but it is a question of degree. Degrees may exist of very gross impertinence; for if you might give information in ten words, and you give it in a thousand, how can it be said that that is not impertinent?

(a) 1 S. & S. 295.

(c) 1 M'Clel. & Y. 334.

(b) 2 S. & S. 574.

(d) Lord *Abinger*.

1835.

GOMPERTZ

v.
BEST.

There is no occasion to lay down a general rule on the subject, it must depend on the circumstances of each particular case. In the present case it is not necessary to carry it to such an extent as to make this answer impertinent. I do not see that there is necessarily any prolixity in this case. The answer, if differently stated, might have been longer or shorter than it is at present, but I cannot say that there is any difference so great as to warrant my holding it impertinent as it now stands. It appears from *Slack v. Evans* as if the Master in that case had reported the answer pertinent; but then he seems to have added something further, for he says, "he cannot do justice without a special reference being made to him to inquire into some prolixity not impertinent." The Master appears to have thought that it was necessary to have a special reference as to prolixity. That case only shews that Lord *Eldon* was of opinion that prolixity was a species of impertinence; but it does not shew that this case is a case of prolixity. I can easily understand that in some cases the use of columns may be very proper. A solicitor is frequently forced to turn the answer prepared for the perusal of counsel into something like a schedule.

Exception overruled.

1834.

The Rev. WILLIAM BARNES, Clerk—Plaintiff;
JOHN STUART, LEONARD SEVERS, WILLIAM FALL, and
CATHERINE ROBINSON—Defendants.

Dec. 2, 6.
1835.
Jan. 16th.

BILL, by the rector of *Richmond*, in the North Riding of *Yorkshire*, against four occupiers of lands, for an account and satisfaction of great and small tithes. Defence, by two of the defendants, a modus; by the other two, an absolute exemption from all tithes.

1. As to the modus.

The material allegations of the answer were in substance these:—That the farms and lands occupied by the defendants respectively are part and parcel of a certain ancient district of land, formerly parcel of the possessions of the masters and brethren of the late dissolved hospital of *St. Nicholas*, near *Richmond*, in the county of *York*. That the said ancient district of land, from time whereof the memory of man is not to the contrary, hath consisted of, and the same now consists of, the several closes, or pieces or parcels of land mentioned and set forth in the map or plan annexed to the defendants' answer by way of schedule; and that the same is, and from time immemorial hath been, bounded in such manner as is stated in the said map or plan. That from time whereof the memory of man is not to the contrary, there hath been paid, and payable, and of right ought to be paid at *Easter* in every year, or so soon after as lawfully demanded, by the owners or occupiers for the time being of the lands forming part of the said ancient

Issue directed to try the validity of a modus laid for a very small district; though the map attached to the answer varied from that given in evidence by the defendants, and though the defendants relied on evidence of reputation to prove the bounds of the district.

The lands of smaller monasteries, which were surrendered to the king after the 27 Hen. 8, c. 28, and were, at the time of their surrender free from tithes, are within the protection of 31 Hen. 8, c. 13, s. 21.

To shew that a monastery held lands discharged from tithes by prescription at the time of its dissolution, positive evidence must be given that the monas-

tery existed prior to the time of legal memory; but if this evidence be given, its possession of the lands before that period may be left to presumption.

Under the general pleading that the lands were, at the time of the dissolution, held discharged "by prescription, or other lawful ways and means," the defendants may give evidence of any legal discharge.

A witness is not disqualified from proving the payment of a modus, on the ground of being an owner of the lands in question, unless it be clearly proved that he is an owner at the time of his examination.

The stat. 3 & 4 Will. 4, c. 42, s. 26, does not render a man, who was sworn before the act, a competent witness afterwards. Whether that act extends to equitable proceedings, *quære?*

Matthew Paris is not evidence of the establishment of the order of Franciscans in *Italy*.

1834.

BARNES
v.
STUART.

district, including the farms and lands so occupied by the defendants as aforesaid, to the rector of the rectory of *Richmond* aforesaid, for the time being, the sum of 1*l.* 19*s.* 11*d.*, as a modus, or customary payment, for and in lieu and full satisfaction of the tithes of all titheable matters arising, growing, and renewing, in and upon the lands within the said district, including the lands so occupied by the defendants as aforesaid, &c.

The map attached to the answer varied from that given in evidence by the defendants. The former included two or three closes, which were omitted in the latter, and *vice versa*. The map attached to the answer contained about 172 acres.

Mr. *Boteler*, and Mr. *G. Richards*, for the plaintiff.

Mr. *Simpkinson*, Mr. *Spence*, and Mr. *Wigram*, for the defendants.

The plaintiff relied on his common-law right as rector.

The documentary evidence for the defendants consisted of the *Pipe Roll* of 18 *Hen.* 2 (to prove that the hospital existed before the time of legal memory); the Ecclesiastical Survey, 26 *Hen.* 8 (to prove that it had lands before the dissolution); a grant of 27 *Eliz.* (from which it appeared that the possession of various lands of the hospital had been concealed by the brethren); and a variety of title-deeds, beginning with a deed of 1641, in which the lands comprised in the grant of *Eliz.* were described by their modern names. To prove the payment of the modus the defendants put in acknowledgments under the hands of three successive rectors of *Richmond*, from April 13, 1776, to 1824. These were expressed to be for the sum of 1*l.* 19*s.* 11*d.*, for a modus in lieu of tithes arising out of lands some time belonging to the dissolved priory of *St. Nicholas*. The earliest of these was signed by *Francis Blackburne*, the then rector. The names of the persons sharing the modus were indorsed on the receipt.

The parol evidence for the defendants, as to the payment of the modus, was that of Mr. *Bowes*, whose testimony, it will be seen, was objected to. They also read the depositions of two of the plaintiff's witnesses, to the effect that no tithes had, to their knowledge, been paid for certain specified lands, which were part of the *St. Nicholas* lands.

To rebut this evidence the plaintiff's counsel put in a series of books kept by the successive rectors, with a view to prove that the alleged modus originated in a composition for hay tithe, and that the word modus did not occur till within a comparatively late period. They likewise produced parol evidence to shew that sums, by way of composition, had been paid for some of the lands.

To prove a series of receipts given by former rectors for the modus, and also to prove the payment of the modus within the time of living memory, the defendants produced *Christopher Bowes*. In his deposition respecting the payment of the modus, this witness stated, "that, as one of the owners of the said lands, he had repeatedly paid the same to the rector for the time being." In another deposition respecting the boundaries of the district, he said that he had his information on that subject "from various persons, and particularly from *Thomas Hutchinson* deceased, on the occasion of the deponent purchasing three closes or parcels of land, described in the plan produced at his examination, and comprised within the said district." The name of the witness appeared upon certain closes described in the plan.

On the part of the plaintiff the testimony of this witness was objected to, on the ground of interest.

For the defendants.—Admitting the witness to be interested, he may, at all events, prove the receipts. *Thompson v. Perryman* (a). As regards the admissibility of

(a) 1 Younge, 598.

1834.

BARNES
v.
STUART.

1834.

BARNES
v.
STUART.

evidence, there is a difference in this Court between the proof of exhibits and the proof of facts. You may bring a witness into Court to prove a fact, depending merely on hand-writing, and the other side cannot cross-examine him. It is clear, therefore, that the Court does not think it necessary to give so much protection to the proof of documents as to the proof of facts. [*Alderson*, B.—But, if it were suggested to the Court that the witness was incompetent, the Court would examine him as to that point. *Turner v. Burleigh* (a). There can be no ground of distinction between one fact and another to be deposed to by an interested witness. The case of *Thompson v. Perryman* is no authority for such a distinction, for there the witness was examined on both sides.] The objection is, at all events, removed by the 3 & 4 *Will.* 4, c. 42, s. 26. When the witness was examined, that act had not passed, but it is now in existence, and ought now to operate; for, under the circumstances of this case, this is the only period when the objection can properly be made. *Perigal v. Nicholson* (b). The case, therefore, as to this point, must be treated as if it were at law, and the evidence must be admitted. It may be said that the act was not intended to apply to proceedings in equity, especially as there is an express direction that the name of the witness shall be indorsed on the record of the judgment in the action: but will not this direction be held to apply by analogy to equitable proceedings? Besides, the claim of the plaintiff is purely a legal right. The account is the only ground for the proceedings being drawn into equity. The effect of the act is to strike out a ground of legal incompetency. If *Bowes*' evidence is rejected, a party's legal rights are varied; and, in order to prevent this, a Court of equity must of necessity send the case to law. Could this have been contemplated by the legislature? Another circumstance is, that it does not appear distinctly that *Bowes* is

(a) 17 Ves. 354.

(b) Wightw. 63; 2 E. & Y. 583.

now the owner of lands which he purchased. He says, that while he *was* owner, he paid his share of the *modus*.

1834.

BARNES

v.

STUART.

ALDERSON, B.—That is the difficulty which I have upon the subject. It does not appear clearly, that, at the time of his examination, the witness was owner of those lands. That cannot be left to presumption. I should not reject the witness at *Nisi Prius* without putting the question, is he now an owner? I must admit the evidence *de bene esse*. With respect to the act of Parliament, the legislature certainly never intended that it should apply to equitable proceedings; and I doubt whether the analogy contended for could be admitted. The statute has made the evidence of an interested witness admissible, conditionally. At law the condition is performed by his name being indorsed on the record; can the condition be performed in equity, by an indorsement of his name on the decree? I have considerable difficulty on that point: it is a statutable rule of evidence. On another point introduced in the argument, I have no doubt upon the construction of the act. It relates only to the time when the witness is sworn. It will not render a man, who was sworn before the act, a competent witness afterwards.

The defendants then proposed to read the deposition of *Bowes* as to the boundaries of the district. The purport of it was, that he knew the lands mentioned in the map or plan produced to him at the time of his examination; that, with certain exceptions, which he specified, they formed a well-known tract, district, or parcel of land, known by the name of *St. Nicholas*; that the boundaries of the said lands were, with the said exceptions, accurately described in the plan; and that the said district had invariably consisted of the same number of acres, during his knowledge of it. He then stated that “he had heard from various persons, and particularly from

1834.

BARNES
v.
STUART.

Thomas Hutchinson, now deceased, &c., that the extent, name, and boundaries of the said district are and were such as deponent hath described and distinguished."

Objected for the plaintiff.—This is a private right, and the hearsay evidence cannot be admitted. The modus is laid as a farm modus, and calling it a district can make no difference. Evidence of reputation is not admissible to establish a farm modus. *Lonsdale v. Heaton* (a), *Lord Anson v. Hodges* (b). In the latter case the district was much larger; but the Master rejected the evidence, and the Vice-Chancellor concurred in the propriety of his decision.

For the defendants.—The cases cited apply only to farms. This is the case of a district. The same point occurred in *Rudd v. Wright* (c), where *Alexander, C. B.*, directed an issue as to the modus for the district of *Great Hodsock*. The Judge, who tried the issue, admitted evidence of reputation to prove the boundaries. Application for a new trial was made to Lord *Lyndhurst*, upon the ground of the inadmissibility of the evidence. Lord *Lyndhurst* refused the new trial, and went very fully into the present question. The difference between a farm and a district appears from the case of *Byam v. Booth* (d), where one of the issues was to try the extent of the district. The objection that the defendants have treated it as a farm modus, is of little weight, and ought not to deprive them of any benefit arising from the fact of this being a district.

For the plaintiff.—*Byam v. Booth* has no application. In *Rudd v. Wright*, the motion for a new trial was made on several grounds; and this, probably, was not considered

(a) 1 Younge, 58.

(c) 1 Younge, 147.

(b) Not reported on this point.

(d) 2 Price, 231; 3 E. & Y. 716.

a material point. That case was, however, cited in the later case of *Lord Anson v. Hodges*, and yet the evidence was not received.

1834.

BARNES
v.
STUART.

ALDERSON, B.—I cannot distinguish the case of *Great Hodsock* from the present. That was described in the pleadings as an ancient farm and lands; and the judgment of the Lord Chief Baron speaks of it as a district. The principle upon which evidence of reputation is admitted, is of a public nature, and applies to public rights. In *Weekes v. Sparke* (a), *Dampier, J.*, puts it upon the right footing. Speaking of a *modus*, he says, “That, strictly speaking, is a private right; but has been considered as public, as regards the admissibility of this species of evidence, because it affects a large number of occupiers within a district.” Are the occupiers here so numerous as to make this a question of a public nature? If I were not pressed by the authority of the case cited, I should have no difficulty in rejecting the evidence. No Judge, in addressing a jury, could tell them that it was worth a farthing.

The evidence was received *de bene esse*.

The case was then argued generally for the defendants. The evidence establishes, *first*, that the lands were part of the possessions of the hospital; *secondly*, that they, with other lands, have been immemorially covered with the payment of this *modus*. It is not of the essence of the *modus* that the answer should be true in every particular respecting the extent of the lands. It is not a question of ownership, but whether the lands were covered with this fixed payment before the time of legal memory. Is it necessary that the extent of the lands should be laid with such nicety, that the variance of half

(a) 1 M. & S. 679.

1834.

BARNES
v.
STUART.

an acre should be fatal? There is a variation, no doubt, between the map in the answer and the map given in evidence. But the evidence of *Bowes* supports the former. In *Byam v. Booth* (a), there was much greater confusion of boundaries than there is in this case, and the Court directed an issue to try the extent of *Bromley Grange*. Here there is, at least, sufficient evidence to send the case to a jury.

For the plaintiff.—The defence stated in the answer is inadmissible. The modus is alleged to be paid by the owners and occupiers of *part* of the district, in respect of the *whole*. [*Alderson*, B.—The answer is not very clearly drawn in this respect, but I think it may be taken to mean that the modus is paid by the owners or occupiers of all the lands together, each of which forms part of the district.] There is no evidence which supports the schedule of the answer. *Bowes*' evidence does not entirely support it; and if his evidence is rejected, there is none to connect the lands with the modus. Neither is there any evidence to shew that proprietors named in the receipts occupied the whole district, so as to make out the whole 1*l.* 19*s.* 8*d.* It may be said that the object of this payment, whether as a composition for all tithes, or for the tithes of hay only, or for a modus, is the proper subject of inquiry before a jury. But it is to be remembered that *Francis Blackburne*, the first rector who gave these receipts, was himself the owner of great part of the property, and therefore interested in establishing a modus. It is to be remembered, also, that the word modus was first introduced into the rectors' books by *Francis Blackburne*. Before his time the several sums mentioned in those books were expressed to be paid as compositions for the tithes of hay, and afterwards simply as compositions. Amongst them is a sum paid for *St. Nicholas' Close*, a close which

(a) 2 Price, 231; 3 E. & Y. 716.

is included in the district. If that sum was paid as a composition for tithes, and we submit that it was, the alleged modus must fail, notwithstanding the long period for which it has been paid. *Short v. Lee* (a), *Fisher v. Graves* (b). Upon the whole we submit that the defendants have failed in establishing the identity of the lands in question, and the payment of the modus; and that a sufficient *prima facie* case has not been shewn to induce the Court to grant an issue.

1834.
BARNES
v.
STUART.

The Court reserved judgment, but intimated that an issue would be directed.

2. As to the exemption.

The answer of the two defendants who relied on a total exemption from tithes, alleged in substance as follows:— That the three several closes or parcels of land, respectively occupied by them, are part and parcel of the scite and possession of the monastery or religious house of White Friars, Friars Carmelites or Minors, in *Richmond*; and which scite and possessions were, by prescription or other lawful ways and means, held and enjoyed by the abbot and monks of the said monastery, at the time of the dissolution thereof, absolutely acquitted and discharged, as well in the hands of themselves as of their lessees or tenants, of and from the payment of all tithes whatsoever, as well great as small, yearly growing, arising, or renewing thereon. That the scite and possessions of the said monastery were surrendered by the abbot and monks of the said monastery to the crown, in the 30th year of the reign of *Hen. 8*, and were held by the crown freed and discharged from the payment of all tithes whatsoever.

(a) 2 J. & W. 464; 3 E. & Y. 1013.

(b) 1 M'Clcl. & Y. 362; 3 E. & Y. 1186.

1834.

BARNES
v.
STUART.

The documentary evidence for the defendants consisted of the King's writ to the sheriff of *Cumberland*, of the 32nd *Edw.* 1, in behalf of the Friars Minors of *Richmond*, commanding him to deliver up a monk, who had stolen some property of one of the brethren; a surrender of the possessions of the monastery in the 30th *Hen.* 8; an inquisition *post mortem* of *Ralph Gower*, of the 9th *Eliz.*, finding him seised in fee of the scite and possessions of the Friars Minors lately dissolved; a grant of the 15th *Eliz.*, on the attainder of *John Gower*, the brother of *Ralph*, of all the lands within the ambit of the walls of the late Friars Carmelites to *Thomas Wray* and *Nicholas Metcalfe*, and the heirs and assigns of *Wray*; and then a series of deeds, deducing the title from *Wray* to the late husband of one of the defendants.

To prove the identity of the lands, the defendants' counsel produced parol evidence to shew that an ancient wall was still in existence; that all the property within the wall was called by the general name of the *Friary*; and that the lands in question were part of that property. For evidence of nonpayment of tithes, they relied on the testimony of two of the plaintiff's witnesses, who deposed to the payment of tithes for other lands in *Richmond*; but stated that, to the best of their knowledge, the lands in question had never paid tithes.

To rebut the evidence of nonpayment, the plaintiff's counsel produced certain entries from the rectors' books, which, however, were not conclusive. To prove that some part of the lands had come into the possession of the *Friary* since the time of legal memory, they produced, from the Patent Roll of 42 *Edw.* 3, a license of mortmain from the crown to different persons, enabling them to grant to the warden and brothers of the *Friary* certain lands contiguous to their manse, for the purpose of enlarging it. Also, in the course of the argument,

Mr. *Boteler*, for the plaintiff, in order to shew that the *Friary* itself was founded since the time of legal memory, proposed to read, as matter of general history, the account given by *Matthew Paris* of the establishment of the order of Franciscans under Pope *Innocent* the third (a).

1834.
BARNES
v.
STUART.

Mr. *Simpkinson*, for the defendants, objected that this was an *English* history.

ALDERSON, B., after adverting to the observation of Lord *Ellenborough*, in General *Picton's* case (b), said that he was disposed to think that *Matthew Paris* was not evidence of the establishment of an *Italian* order; but, if the plaintiff could produce an *Italian* history or a translation, he would receive it.

Upon the general question of exemption, Mr. *Boteler* and Mr. *G. Richards*, for the plaintiff, relied on the common-law right of the rector.

Mr. *Simpkinson*, Mr. *Spence*, and Mr. *Wigram*, for the defendants.—*First*, although this was one of the smaller monasteries; yet, if its possessions were free from tithes at the time of the surrender, they are within the protection of 31 *Hen.* 8, c. 14, s. 21, which continues the exemption from tithes in certain abbey lands, which were exempted previous to their surrender or dissolution. By the sixth section of 27 *Hen.* 8, c. 28, which dissolves the smaller monasteries, power is given to the king to continue such of them as he shall think fit. This monastery was so continued; for the king took a surrender of it in the 30th year of his reign. Now *Walklade v. Wilshaw* (c), and *Tate v. Skelton* (d), are authorities to shew that the

(a) The passage proposed to be read was from pp. 339, 340, of the edition of 1640, under the year 1227.

(b) 30 How. St. Tri. 492.

(c) Degge, Pars. Coun. 326.

(d) 4 Gwill. 1503; 3 E. & Y. 1379.

1834.

BARNES
v.
STUART.

protection of 31 *Hen.* 8, c. 14, s. 21, is extended to the lands of all monasteries, whether small or great, which came to the crown after the 4th of *February*, 27 *Hen.* 8. These cases are confirmed by *Tourie v. Pearson* (a), *Leigh v. Downes* (b), *Wood v. Bulstrode* (c), *Hastings v. Toon* (d), *Pritchett v. Honeyborne* (e).

Secondly, the lands of this monastery, at the time of its surrender, were held freed and discharged from the payment of tithes. It must be conceded that actual nonpayment of tithes at the time of the surrender cannot be proved; but the Court adopts in these cases the same principle as is adopted in cases of *modus*; it will not require impossibilities; but, if there be uncontradicted evidence of living witnesses for a long period, the Court carries back their evidence, and considers their testimony sufficient to found a presumption of nonpayment at the time of the dissolution. It is sufficient to shew that, at the time of the dissolution, the lands belonged to the monastery, and that no tithes have been since paid. The Court will draw the inference that they were properly discharged. *Nash v. Mollins* (f). [*Alderson*, B.—It was only the mode of pleading that was in issue there. All that that case decided was, that it was sufficient to plead that the prior had held the lands time out of mind discharged of tithes, without shewing how they were discharged.] *Lamprey v. Rooke* (g) is, at all events, an authority for the proposition advanced. Lord *Hardwicke* there says, that if lands appear to have been part of the dissolved monasteries, and there is no evidence of the payment of tithes for those lands at any time, Courts will consider them as discharged by some way or other, before the dissolution, in the hands of the abbot, &c.;

(a) 1 Wood, 13; 1 E. & Y. 411.

(b) 1 Wood, 124.

(c) 2 Wood, 289.

(d) 3 Wood, 455.

(e) 1 Y. & J. 135.

(f) Cro. Eliz. 206; 1 E. & Y. 100.

(g) Ambl. 191; 2 E. & Y. 148.

1834.

BARNES
v.
STUART.

and that it is sufficient to allege that they were part of the possessions, &c., and were, at the time of the dissolution, by prescription, composition, or by other lawful ways and means, discharged from payment of tithes. To the same effect is the language of Lord Coke, in the *Archbishop of Canterbury's case* (a), as are also the cases of *Cooke v. Butt* (b), and *Matthews v. Fitch* (c). In *Ingram v. Thackston* (d), the three Barons held, that from the long nonpayment of tithes for part of certain abbey lands, called *Bromley Grange*, an absolute exemption for that part might be presumed, although other parts of *Bromley Grange* had paid tithes. [*Alderson, B.*—The Lord Chief Baron there held, that the exemption was only *quamdiu propriis manibus*. I think he was right, and the other Barons wrong. In modern times the case would have been decided differently.] The more modern cases of *Donnison v. Elsley* (e), and *Humphreys v. Wagstaff* (f), shew strongly the efficacy of proof of nonpayment of tithes for a long period. In the latter case this species of proof was given, and the Master of the Rolls held, that nonpayment from the time of the dissolution might be presumed; and that, from this circumstance, combined with the fact of the abbey being in possession of the lands at the time of the dissolution, an absolute discharge from tithes might be presumed.

But it may be contended that this monastery was established since the time of legal memory; that proof of exemption must always depend on prescription; and that, therefore, as there is no prescription in this case, the defence of exemption must fail altogether. There is no direct evidence when the monastery was founded. There

(a) 2 Rep. 46; 1 E. & Y. 113, 117.

(b) 6 Mad. 53; 3 E. & Y. 1060.

(c) 3 E. & Y. 1238.

(d) 2 Gwill. 819; 3 E. & Y. 1242.

(e) 1 M'Clel. & Y. 1; 3 E. & Y. 1393.

(f) 1 Russ. & M. 529.

1834.

BARNES
v.
STUART.

is evidence, however, from which it may be presumed that it was founded before the time of legal memory. [*Alderson*, B.—That cannot be left to presumption; there must be some distinct proof of it. It was so laid down by *Richards*, C. B., on the motion for the new trial in *Markham v. Smith*. He cited a case from *Gwillim* (a), in support of his observation.] But, according to the language of the same learned Judge, in another stage of the same case, “competent evidence is admissible to enable a Court of judicature to infer it” (b). The question, therefore, is still open, What is competent evidence for this purpose? We have not, it is true, strict direct proof that the abbey was in existence, or that the lands were enjoyed with it, before the time of legal memory. But we have evidence of its existence as far back as the time of *Edw. 1*; and that it was then possessed of personal, if not of real, property. Is not this competent evidence, from which to infer its existence prior to the time of legal memory? And, coupling this presumption with the evidence of the non-payment of tithes, to what can that nonpayment be referred, but to a legal exemption existing at the time of the dissolution?

But even assuming that this monastery was founded since the time of legal memory, would not the Court presume a legal discharge where lands have been held five hundred years free from tithes? [*Alderson*, B.—If the exemption arises subsequently to the time of legal memory, must you not shew a special discharge? Does not general pleading throw upon you the necessity of proving prescription?] In *Price v. Downes* (c), the discharge was pleaded generally, and the Court were so well satisfied that this allegation was made out, that they dismissed the bill; yet according to the catalogue of the greater monas-

(a) *Clavill v. Oram*, 4 Gwill.
1354; 3 E. & Y. 1369.

(b) 3 E. & Y. 1073.

(c) 1 Wood, 522.

1834.

BARNES
v.
STUART.

teries, the priory of *Sheen*, to which the lands in question belonged, was founded long after the time of legal memory, namely, by *Henry 5*, in the year 1414. Similar observations apply to *Powell v. Powell* (a), *Lambert v. Cumming* (b), *Save v. Lodge* (c), *Hastings v. Toon* (d). The monastery of *Grace Dieu*, mentioned in the last case, was founded in the time of *Hen. 3*, according to *Speed*. [*Alderson*, B.—The last was a case of prescriptive discharge, according to the report; and *Speed* cannot be cited as evidence to the contrary. *Speed's* statement was not offered to the consideration of the Court.] In all these cases the discharge was pleaded generally, and it was held sufficient. In the present case, the pleading is, that the lands were discharged by prescription or other lawful ways and means. If, therefore, we cannot avail ourselves of prescription, we have a right to shew that the lands have been discharged by composition, grant, bull, or otherwise; and upon evidence of nonpayment long continued, the Court will presume this. [*Alderson*, B.—The question is, whether that proposition is consistent with the admission that the fact did take place after legal memory. Does any case go that length? Must not the bull or grant be from the time whereof the memory of man runneth not to the contrary?] The Court will presume a grant of tithes since legal memory. *Oxenden v. Skinner* (e). Grants in all cases may be presumed, where they are consistent with the possession. Here there was a spiritual body, capable of obtaining a grant; and, therefore, a grant may be presumed in this as well as any other case.

Mr. *Boteler* and Mr. *G. Richards*, for the plaintiffs.—

(a) 2 Wood, 166; 1 E. & Y.
765.

(b) Bunb. 138; E. & Y. 790.

(c) 2 Wood, 366.

(d) 3 Wood, 455.

(e) 4 Gwill. 1513; 3 E. & Y.

1384.

1834.

BARNES
v.
STUART.

The cases which have been cited on the other side are mere simple cases of prescription, and do not involve the question whether, on the failure of prescriptive evidence, the Court will go on to presume a bull or grant. The question here is, in truth, not one of prescription, but whether, where a monastery has been founded after the time of legal memory, the possessions of it can be protected from the payment of tithes, by presuming a bull or grant. It must be admitted that the language of Lord *Hardwicke* in *Lamprey v. Rooke* (a) bears out the defendants in their argument; but not so the case itself: for the estate of *Stonar* belonged to the abbey in question in the time of *William Rufus*. The opinion of Lord *Coke* in the *Archbishop of Canterbury's case* was extrajudicial; and was entirely disapproved of, and held not to be law in *Slade v. Drake* (b), in which the observations of Lord *Hobart* are decisive of the present case. The cases of *Cooke v. Butt* (c), and *Matthews v. Fitch* (d), were cases of prescription. The same observation applies to that of *Humphries v. Wagstaff* (e), which was also treated by Sir *John Leach* as a case of prescription. It is true that in the present case the defendants, in the first instance, endeavour to set up a prescriptive defence; but so far from shewing that the lands in question have belonged to the monastery from time immemorial, they do not even shew that the monastery itself existed before the time of legal memory. In *Clavill v. Oram* (f), where it was admitted that the religious house had existed from time immemorial, it was not therefore presumed that the lands in question, in that case, had been immemorially attached to the house; but *Doomsday Book* was produced, in order to prove that fact. That case was confirmed by *Marham*

(a) Ambl. 191; 2 E. & Y. 148.

(d) 3 E. & Y. 1238.

(b) Hob. 295; 1 E. & Y. 314, 319.

(e) 1 Russ. & M. 529.

(c) 3 E. & Y. 1060.

(f) 4 Gwill. 1354; 3 E. & Y. 1369.

v. Smith (a). In the case of *Donnison v. Elsley* (b), Chief Baron *Alexander* decided against the defendant. The observation of the learned Judge in that case, which is mainly relied upon by the present defendants, is a mere *dictum*, entirely unnecessary to the decision. But allowing the defendants the full benefit of that case, and also of *Norton v. Hammond* (c), all that they decide is this:—that if the religious house be proved to have existed from time immemorial, and to have had lands at the time of its dissolution, those lands may be presumed to have been attached to the house from time immemorial. In those cases, however, only one presumption was admitted; in the present case the Court is called upon to make two presumptions; namely, both that the house has existed, and that the lands have belonged to it from time immemorial. [*Alderson*, B.—A spiritual person may prescribe in *non decimando*. Is that true in all monasteries? Is not that confined to immemorial monasteries? It is worthy of consideration, whether the Court cannot require some proof that it is an immemorial spiritual body, before it allows it to prescribe at all.] That is certainly the law. In *Pritchett v. Honeyborne* (d), Chief Baron *Alexander* says, “It is necessary to shew, not only that the lands were in the hands of the monastery at the time of the dissolution, but that they had been in their hands discharged by prescription. This is the least burden which a defendant in a tithe suit, insisting on a *non decimando*, can be expected to carry.” Another circumstance in this case is, that it appears from the grant for enlarging the house in the time of *Edw. 3*, that part of the possessions of this monastery came to it since the time of legal memory; therefore, as the defendants do not define these lands, both these

1834.

BARNES
v.
STUART.

(a) 11 Price, 126; 3 E. & Y. Y. 1393.
1071.

(c) 1 Y. & J. 94.

(b) 1 M'Clel. & Y. 1; 3 E. &

(d) 1 Y. & J. 135.

1834.

BARNES
v.
STUART.

and all other lands of the monastery must stand on the same footing, and they cannot avail themselves of a prescriptive defence for any part.

But beyond this, the defendants have attempted to shew that even where a monastery has been founded within the time of legal memory, and the lands were held discharged from tithes at the time of the dissolution, an absolute discharge may be established, if not by prescription, at least by the presumption of a bull or grant. We submit that the defence of prescription precludes the other mode of defence; but, at all events, no such conclusion as that contended for can be drawn from the cases. In *Towrie v. Pearson* (a), a bull was produced, or evidence was given of its existence. *Powell v. Powell* (b) merely turned upon prescriptive evidence. The defence was title to tithe (in which the production of the original deed would be unnecessary), or exemption by prescription. That case, therefore, cannot be cited as an authority to shew that a bull or grant may be presumed within the time of legal memory. In *Lambert v. Cumming* (c), the abbey was founded before the time of legal memory, but the order of monks was changed in 1090. The change could make no difference; but, at all events, the defence was prescriptive. In *Save v. Lodge* (d), the grant from Ric. 2 to the abbey was produced. *Dugdale* has printed the grant. It was not an original grant, but a confirmation of all former grants; and as the monastery had existed prior to legal memory, there was no difficulty in presuming that the former grants were made before legal memory. In *Hastings v. Toon* (e), the defence was prescriptive, though the monastery was not founded till after the time of legal memory; but the point now under discussion passed *sub silentio*, and upon

(a) 1 Wood, 13; 1 E. & Y. 411.

(b) 2 Wood, 166; 1 E. & Y.
765.

(c) Bunb. 138; 1 E. & Y. 790.

(d) 2 Wood, 366.

(e) 3 Wood, 455.

1834.

BARNES
v.
STUART.

prescriptive evidence the defendants were held to succeed. The case of *Oxenden v. Skinner* (a), is quite against the doctrine for which it was cited. There, a portion of the tithes, which had been severed from the rectory at the Conquest, was granted to the dean and chapter of *Rochester* in the time of Queen *Elizabeth*, but no possession was ever given to them. Lord *Kenyon* ruled that from long possession of the tithes by the owners of the estates, a grant by the dean and chapter might be presumed. But this was not a presumption of a grant of all the tithes against the rector, but of a portion of them, severed from time immemorial, against persons who had never had possession of them. Upon the whole, there can be no such presumption as that claimed for the defendants. A bull must be dealt with as a composition real; and a deed creating a composition real cannot be presumed from the long nonpayment of tithes. *Escourt v. Kingscoate* (b). They must then give some evidence of the bull having issued. Neither can a grant be presumed under the same circumstances. Deeds must be produced, or evidence of such deeds given, making the tithes the subject of conveyance. *Heathcote v. Aldridge* (c).

Mr. *Simpkinson*, in reply.—It is not incumbent on persons claiming under a religious house to shew distinctly and unequivocally that their claim existed before the time of legal memory. In *Slade v. Drake* it is laid down, that discharge in abbots must now be proved *à posteriori*; for no man living can now speak to the time of abbots. Now, discharge *à posteriori* is correctly explained in *Degge*, p. 330. He says—“What was done before the dissolution of abbies, must now be proved by what has been done since; for if monastery lands have been held all

(a) 4 Gwill. 1513; 3 E. & Y. 1384. (b) 4 Madd. 140; 3 E. & Y. 948.

(c) 1 Madd. 236; 3 E. & Y. 728.

1834.

BARNES
v.
STUART.

the time of memory since the dissolution, freed from the payment of tithes, it shall be intended they were so held before." In all the cases cited from *Wood*, the evidence begins with the surrender of the monasteries. And in all these cases the monastery was founded subsequent to the time of legal memory. If the argument on the other side is good, what becomes of these cases? It is said that a bull or grant cannot be presumed; that you must prove the bull or grant by production, or give distinct and unequivocal evidence that such a document existed. In support of that proposition, the opinion of Lord *Hobart* is cited; but that opinion is unsatisfactory. He says, that in general there is no mischief in discharges created since memory, if they be true, and the original unknown; for they may be supposed, and pleaded by prescription; but that in abbey land, where the abbey was founded, or the lands purchased, since the time of memory, there can be no reasonable presumption of a lawful discharge, because there is no prescription; and that to presume such a discharge, is as much as to say all abbies have discharges for all their lands. This opinion of Lord *Hobart* was unnecessary for the decision of that case; and there is no reason why the Court may not presume an absolute discharge in abbey lands since the time of memory, as well as it may presume any thing else. *Mead v. Norbury* (a).

1835.

Jan. 16th.

ALDERSON, B.—This was a bill filed by the plaintiff the rector of the parish of *Richmond*, in *Yorkshire*, against the defendants, for an account of all their titheable matters.

The two first defendants set up as a defence, that the lands occupied by them formed part of an ancient district of land formerly belonging to the masters and brethren of Saint *Nicholas'* Hospital, and that a modus of 1*l.* 19*s.*

(a) 3 Bligh, 211, 235.

11*d.* is payable at *Easter* annually, in lieu of all the tithes of the lands comprised within such district. They annex to their answer a schedule of the lands comprising the district.

1835.
BARNES
v.
STUART.

The two last defendants, *Ford* and *Robinson*, set up a different defence. They allege that the lands in their occupation were part and parcel of the scite and possessions of the monastery of the late White Friars, Friars Carmelites or Minors, at *Richmond*, one of the smaller monasteries; and that the abbot and monks of that monastery held them at the dissolution by prescription, or other lawful ways and means, absolutely discharged from the payment of all tithes.

Upon the first question, I intimated at the hearing my opinion to be, that unless, on further investigation, it should be materially changed, I should feel it to be my duty to direct an issue to inquire into the validity of the alleged modus; and on further consideration, I see no reason to alter that determination. I fully, however, agree with what is stated by Lord *Eldon*, in the case of *Bullen v. Michell*, in the House of Lords (*a*), that it is the duty of this Court, and it is not the first time that I have had occasion to make the remark, to decide both on the law and on the fact; and that I ought not, merely in order to dispatch business, or to get rid of some portion of my own responsibility, to send an issue to be tried by a jury where the conclusion mainly depends on the effect of written or printed documents, or on undisputed oral testimony. It is obvious, that in such cases the Court is a much fitter tribunal than the jury, for the purpose of determining the cause. But there is another class of cases in which the imperfect mode of taking parol evidence in this Court places us in a situation of no ordinary difficulty in ascertaining facts. No one can read the depositions taken in

(*a*) 4 Dow. P. C. 297; 3 E. & Y. 757.

1835.

BARNES
v.
STUART.

a Court of equity, without being satisfied that it is only on tolerably clear cases of fact that they can afford real information. Where the individual credibility of the witness becomes important, which it always does where there is contradictory testimony, the Court must direct an issue, because in no other way can this be properly weighed and determined. What is *really* wanted is, the oral examination and cross-examination of the witnesses; and the assistance of a jury is, as it seems to me, only incidental to this important object. I for one should be quite as well, and perhaps better satisfied, if, instead of directing issues, the trial of which often miscarries, and causes infinite expense to the parties, it were competent to this Court in such cases, either to direct an issue, or to require the oral examination of witnesses to take place before itself, on an issue previously defined. The conscience of the Court, I should apprehend, would quite as well be satisfied by its own immediate conclusion on the evidence, as it could be mediately through the opinion of the jury; who, in cases of this description, are sometimes not altogether free from prejudice. If I thought, therefore, that no more light could be thrown on this case by further investigation, I should feel it to be my duty now to determine it; but when I am called upon to decide as to the validity of the *modus* set up by the first two defendants, I am not able to satisfy myself fully either way, upon the evidence now before me. I wish to give no opinion on this part of the case at present. The materials now before the Court are sufficient to raise a question of some doubt, which I think it is probable may be settled by more full inquiry. I purpose, therefore, to direct an issue in the terms of the *modus* set forth in the defendants' answer and schedule, but with directions to the Judge, inasmuch as there probably will be some inaccuracy discovered in the setting forth of the district, to indorse any

special matter on the *postea* which may be required for the just determination of the case, reserving all question of costs till the issue shall have been disposed of.

I now proceed to the consideration of the second question. The monastery in question, although one of the smaller abbeys, was not surrendered to the crown until 30 *Hen. 8.* It is clear, therefore, I think, that this is a monastery within the exception contained in the 31 *Hen. 8.* The 21st section of that act extends the exemption to all abbey lands, where the surrender to the crown was subsequent to *February 4* in the 27 *Hen. 8.* It has been usual to speak of the exemption as confined to the greater monasteries, because the far greater number of the smaller abbeys were dissolved by the 27 *Hen. 8.* The true construction of the act, however, applies to all, whether great or small, surrendered after the given date. It is probable that the dissolution of the monastery in question was, under the 6th section of 27 *Hen. 8.*, postponed for a short time. The actual surrender has been proved in this case, and is of the date of 19th *January*, 30 *Hen. 8.* This part of the defendants' case is, therefore, well made out. I think, also, that it is clearly established, that the lands occupied by the defendants belonged to the abbey at the time of the dissolution.

It only, therefore, remains to be proved, that the abbot and monks held these lands discharged from tithes at that period. Now this they might do, either by unity, bull, real composition, or prescription: and there is no doubt that on these pleadings it is open to the defendants to prove a discharge by any lawful means. The authority of Lord *Hardwicke*, in the case of *Lamprey v. Rooke* (a), and there are other authorities to the like effect, satisfies me that this may be done. But I am by no means satisfied

1835.
BARNES
v.
STUART.

(a) Ambl. 291; 2 E. & Y. 148.

1835.

BARNES
v.
STUART.

that this alters the nature of the proof required, although in the cases a general form of pleading is allowed, in order to establish the case in point of fact.

Now the proof here given is, first, a warrant to the sheriff of *Cumberland*, 32 *Edw.* 1, for the apprehension and surrender to the abbot and community of one of their own body, who had ran away with part of the property of the convent. And this document, which neither carries the existence of the corporation so far back as the time of *Rich.* 1, nor shews that at the time of *Edw.* 1 they possessed lands, is all that the defendants produce to establish their case, in addition to the modern usage of non-payment of tithes. According to the authority of *Clavill v. Oram* (a), and *Markham v. Smith* (b), this proof would not be sufficient; for the Court in those cases required proof, independent of the fact of nonpayment, that the monastery was founded before time of memory, and that it was in possession of lands at that period. It has been said, that this doctrine was overruled by Lord Chief Baron *Alexander*, in the case of *Donnison v. Elsley* (c). To a certain extent it undoubtedly was so, but no case has yet been decided, in which both the facts of the antiquity of the abbey, and the possession of the lands, were inferred from the modern usage only.

In these cases of conflicting authorities, it is well to have recourse to principle and analogy.

It has been decided, and I apprehend that the law is now settled on that point, that you cannot infer a real composition within time of memory, from the mere payment of a given sum in lieu of tithes. Why is this so? Probably, because the only rational inference is, that from what has been long done, and for which no beginning can be found, you ought to conclude that the same thing has

(a) 3 E. & Y. 1369. (b) 11 Price, 126; 3 E. & Y. 1071.

(c) 1 M'Clel. & Younge, 1; 3 E. & Y. 1393.

1835.

BARNES
v.
STUART.

been done before time of memory. From a mere payment, therefore, you infer a payment before legal memory, arising from some parol agreement between the parties; but you do not infer a composition-real, because that is a payment which originates by an express document or deed, made under particular sanctions, and executed by particular individuals, for the express purpose of preservation in future, and originating after the time of *Rich.* 1. Now to draw such a complicated inference of various facts, instead of the simple and obvious one before mentioned, would not be conformable to right reasoning; the Court, therefore, requires some additional fact to be added to the proof of non-perception and payment of a fixed sum, before it infers a composition-real.

So, again, in the case of exemption by bull: there must be some proof, at least, that such a document existed, because the existence of such a document, after legal memory, is not the proper and natural inference from the mere proof of nonpayment of tithes. It seems to me that the foundation of an abbey before a given period, is a fact of a similar description. It must have been done by some formal act of incorporation, of which it is reasonable to expect some traces to be left. I am, therefore, at present induced to think, that the opinion of the Court in *Clavill v. Oram*, and *Markham v. Smith*, is, at least to the extent of requiring some additional proof of the existence of the abbey itself before legal memory, well founded; but I fully concur with Lord Chief Baron *Alexander*, in holding that where such proof has been given as to the antiquity of the foundation itself, from which properly to infer the two further facts of continued nonpayment of tithe, and that the lands in question belonged to such an abbey at the time of the dissolution—that those lands had also belonged to it from the time of its foundation, and consequently before legal memory.

As this point was very fully and ably discussed in the

1835.

BARNES
v.
STUART.

course of the argument, I have thought it right to examine the authorities, and to deliver my opinion upon it; but it is not necessary for me to hold in this case, that even if the evidence of modern usage as to nonpayment of tithes had been satisfactory to my mind, the plaintiff would, notwithstanding, be entitled to a decree against these defendants; for if the law were otherwise, it seems to me quite impossible to say that there is any satisfactory evidence of such nonpayment in this case. The only witnesses on this subject are *Thomas Bradley* and *Ottiwell Tomlin*, who were examined for the defendants; and *Leonard Robinson* and *P. Brackenbury*, who were witnesses for the plaintiff. *Bradley* only proves that the lands belonged to the Friary; but neither he nor *Ottiwell Tomlin* say one word about their not having paid tithes. Of the other two witnesses, one, *Leonard Robinson*, is only twenty-six years of age, and has known the premises only eight years; and all that he says as to the nonpayment is found in an exception contained in his answer to the tenth interrogatory. If taken literally, it would include the particular closes in question; but the attention of the witness is not called to the specific fact; he is speaking of two classes of land, the one which pays without dispute, the other the lands in question, of which, with some exceptions, the tithes have not, to his knowledge, been paid. This evidence is scarcely worth consideration.

The only remaining evidence is that of *Pierce Brackenbury*, aged sixty, who has lived from his infancy at the place, and was employed between 1795 and 1803 or 1804, as a tithe collector. He says, that all the lands comprised in the maps in this suit have, with some trifling exceptions, paid neither tithes, nor satisfaction nor composition for tithes. His evidence, therefore, is clearly incorrect, for it would negative the payment of the *modus* respecting which I have directed an issue. It is clear that on this vague and incorrect evidence I ought not to act;

I therefore think that there must be a decree against the two last defendants, *Ford* and *Robinson*, for an account of all tithes due, and with costs.

Decree accordingly.

1835.

BARNES
v.
STUART.

The PRINCIPAL, FELLOWS, and SCHOLARS of JESUS COLLEGE, in the University of OXFORD—Plaintiffs;
RICHARD GIBBS, THOMAS EDWIN GIBBS, SAMUEL PLUMB, and DANIEL PLUMB—Defendants.

Dec. 8th, 11th.
1835.
Jan. 16th.

BILL against four occupiers of lands in the parish of *Tredington*, in the county of *Worcester*, for an account and satisfaction of great and small tithes, since the 12th of *May*, 1833. Defence—farm moduses.

To a bill filed for an account of tithes, an answer containing an alternative of inconsistent defences is bad *in toto*. Therefore, where the defendants in a tithe suit set up by their answer certain yearly payments as moduses, but insisted that if the same, for any reason, were not good and valid moduses from time immemorial, they must be taken to have been payable as a good and valid real composition, made with the assent of all parties

The rectory of *Tredington* consists of several townships and hamlets, and is held in undivided portions. At the time of the execution of the indenture hereinafter mentioned, and thenceforth until the institution of the present suit, the Rev. Dr. *Jane* and the Rev. *Thomas Hopkins* were joint rectors of the parish. By an indenture of demise, dated the 7th of *November*, 1832, and executed between *Jane* and *Hopkins* of the one part, and the plaintiffs of the other part, the said *Jane* and *Hopkins* demised to the said plaintiffs all and singular the great and small tithes, yearly arising, &c. out of the parish of *Tredington*; excepting out of the said demise, unto the said rectors, all and all manner of *Easter* offerings, mor-

whose assent was necessary thereto, and before the restraining statute of 13 *Eliz.*:—*Held*, that this alternative was inadmissible; that the latter branch of it could not be rejected as surplusage; and that the plaintiffs were entitled to a decree.

A party who is directly interested in the event of an action or suit, by being liable for the costs, cannot be rendered a competent witness under the provisions of the stat. 2 & 3 *Will.* 4, c. 42, s. 26.

The mere refusal of a witness to produce a document, where he is not justified in withholding it, is not a ground for going into secondary evidence of that document.

The taking of a husbandry lease *bond fide* by a religious house, is not within the Statute of Mortmain.

1834.

JESUS
COLLEGE
v.
GIBBS.

tuaries, &c., to hold the said tithes and tenths to the plaintiffs and their successors for the time being, from the 12th day of *May*, 1832, for and during the term of twenty-one years, if they, the said rectors, should so long live and continue rectors of the said parish.

The bill alleged that, by virtue of this demise, the plaintiffs were entitled to receive the tithes in kind; and it stated certain notices which had been served upon the several defendants, requiring them to set out their tithes, and stating that, after the 12th of *May*, 1833, the several compositions or money payments of 17*s.*, 7*s.*, and 18*s.* 6*d.*, theretofore paid by the defendants respectively, would no longer be received.

The answer, after stating the defendants' belief that the several sums of 17*s.*, 7*s.*, and 18*s.* 6*d.* had, from time immemorial, been paid and payable yearly as moduses, in lieu of tithes for their respective occupations, alleged as follows:—"And these defendants say they respectively humbly insist upon such payments as moduses; but, in case such yearly payments, or any of them, for any reason, be not good and valid moduses from time immemorial, which these defendants do not admit, then they humbly insist that the same are and must be taken to have been payable as or by way or by virtue of a good and valid real composition, made by and with the assent of all parties whose concurrence or assent was necessary therein and thereto; and before the restraining statute made and passed in the 13th year of the reign of Queen *Elisabeth*." In conclusion, the defendants submitted whether the plaintiffs were, as a body corporate, capable of taking such lease as aforesaid, and they claimed the same benefit as if they had pleaded or demurred to the bill.

Mr. *Boteler*, and Mr. *G. Richards*, for the plaintiffs.—
The defendants say that the plaintiffs, as a body corporate, are not capable of taking a lease; they, therefore, deny the plaintiff's title. On the other hand, admitting the plain-

1834.

JESUS
COLLEGE
GIBBS.

tiff's title to be good, they set up moduses in respect of the several farms and lands in their occupation; insisting, however, that, if these are not moduses, they are compositions real, made with the assent of all parties before the restraining statute of 13 *Eliz.* As to the first point, the taking a lease for a very long term of years is certainly mortmain within the 17 *Edw.* 1, which ordains that no person, religious or other, buy or sell, or under the colour of any gift or lease or any other title, receive lands or tenements, whereby such lands or tenements may anywise come into mortmain. But it is too clear to admit of any doubt that a religious body, taking a mere common husbandry lease, is not within the Statute of Mortmain. In *Brooke's Abridgment* (a) it is said by *Nele*, "Lease for 100 or 200 years is mortmain for the length of time; for colour of a term, &c." *Brooke* cites from 3 *Edw.* 4, fol. 13, 14; and the distinction is there clearly stated. *Nele* there says, "Where a small term has been recovered or given to a religious man, as twenty years or forty years, that is not contrary to the statute *de religiosis*; otherwise in case it was of a term of 100 or 200 years, so that by long continuance of possession, it might, perhaps, continue for ever, and come into mortmain. But of a small term the law will not take notice." To the same effect is *Viner* (b), though his observation in the margin is wrong, as to a supposed mistake of *Brooke*. To the same effect, likewise, is 4 *Hen.* 6, fol. 9, pl. 1. Besides, it is clear that neither the 17 *Edw.* 1, nor the 15 *Rich.* 2, c. 5, apply to tithes. The object of these statutes was to prevent the inheritance of lands from coming into religious houses.

Then, with respect to the moduses, the defendants have no right to an alternative defence. They may insist either upon a modus or a composition real, but not upon both. In *Bennett v. Neale* (c), on a bill for tithes by a rector, the

(a) Bro. Mortmaine, pl. 27. (b) Vin. Abr. Mortmain (B.), pl. 21.

(c) Wightw. 324; 2 E. & Y. 630.

1834.

JESUS
COLLEGE
v.
GIBBS.

defendants set up a *modus*. At the hearing, the evidence did not apply to an immemorial payment, but it was contended that it was admissible to prove a composition real. *Wood*, B., would have admitted it, but the rest of the Court were against him, and thought that the defence of a composition real and a *modus* stood on distinct grounds. It must be admitted that they did not, in this case, plead in the alternative; but *Graham*, B., said, that a composition real had always been considered, from the earliest time, as a totally distinct head of defence from a *modus decimandi*. There was afterwards a second suit in this matter, in which the defence set up was a composition real; but the defendants failed (a). In *Ward v. Shepherd* (b), the defendants insisted on a composition real; the evidence went to establish a *modus*, and the plaintiff had a decree. In a second suit, that of *Fielder v. Meynell* (c), the defendant set up a *modus*, and succeeded. There, however, the point was not carried so far as it is in this case. The defences were separate, the pleaders thinking they could not put both defences on the record; but in *Leach v. Bailey* (d), the pleading was in the alternative, and was held to be bad: that case, therefore, is decisive of the present. If this mode of pleading be allowed, every rank *modus* may be turned into a composition real; and the clergyman will never know to what point he ought to direct his evidence.

Mr. *Simpkinson*, Mr. *Sidebotham*, and Mr. *W. Eagle*, for the defendants, gave up the objection as to the invalidity of the lease, and proceeded to argue the question of pleading. These defences are not inconsistent, and the

(a) *Bennett v. Skeffington*, 4 Price, 143; Dan. 10; 3 E. & Y. 827.

(b) 3 Price, 608; 3 E. & Y. 795.

(c) Not reported.

(d) 6 Price, 504; 3 E. & Y. 953.

pleading is allowable. In *Atkins v. Hatton* (a), it was held that a payment set up in an answer as a modus or composition real is not bad for uncertainty. *Haywood v. Nicholls* (b), *Franklin v. Holmes* (c), *Carte v. Ball* (d), and *Nagle v. Edwards* (e), are likewise authorities in favour of the defendants. [Alderson, B.—The defendants set up one defence, but do not say whether it is a modus or a composition real. They insist upon some payment, but say it is either one thing or another—they do not know which. It is a very ambiguous answer. In *Atkins v. Hatton* the Court treated it as a plea of a modus; not as an alternative plea. Besides, the composition was stated to have been immemorially paid; it was not, therefore, in fact, a composition real. That case, however, is the strongest in your favour. Under that you may be entitled to go into the question of modus, though not to go into the question of the composition real.] There are various authorities to shew that, where the same answer insists on a modus, and on a composition from year to year, requiring notice, the Court may reject the one defence and enter into the consideration of the other. *Atkins v. Lord Willoughby de Brooke* (f), *Bishop v. Chichester* (g), *Wolley v. Brownhill* (h). In *Skipwith v. Pickering* (i), the defendants insisted on all the legal discharges from tithes that could be made out. In *Wilkinson v. Foot* (j), the defendant insisted on a sum payable by way of modus or composition. In *Travis v. Oxton* (k), the wording of the issue was, “whether the tilt penny paid by the occupiers of

1834.

JESUS
COLLEGE
v.
GIBBS.

(a) 2 Anstr. 386; 2 E. & Y. 403.

(b) 3 Gwill. 1120; 3 E. & Y. 1272.

(c) 3 Gwill. 1229; 3 E. & Y. 1307.

(d) 3 Atk. 496; 2 E. & Y. 103.

(e) 3 Anstr. 702; 2 E. & Y. 427; 2 Eagle on Tithes, 366, n.

(f) 2 Anstr. 397; 2 E. & Y. 406.

(g) 2 Bro. C. C. 161; 3 E. & Y. 1354.

(h) M'Clelland, 317; 3 E. & Y. 1152.

(i) 1 Wood, 265.

(j) 1 Wood, 129.

(k) 3 Wood, 523; 3 E. & Y. 1248.

1834.

JESUS
COLLEGE
v.
GIBBS.

houses within the townships of *Great Sutton* and *Little Sutton* to the vicar of the parish of *East Ham*, had been paid and accepted as modus or composition in lieu and satisfaction of tithe hay." The cases of *Gurdon v. Sell* (a), and *Humphreys v. Wagstaff* (b), are likewise authorities in favour of the defendants. [*Alderson*, B.—The difficulty in this case is, that you set up an alternative, which requires a different species of proof from the defence which you first insist upon: a mode of pleading certainly calculated to embarrass the party. In *Skipwith v. Pickering*, the defendants could not have set up a modus, though they could insist on any thing that went to the total discharge of tithes. In *Wilkinson v. Foot*, and the other cases, there was no difference between the modus and composition. You are setting up in the alternative a composition real, which is a different thing. You say that the payment either did or did not exist from time immemorial: there is the difficulty.] An error in one part of the defence does not vitiate the whole. A defendant is not required to set forth his defence with technical precision. There is no rule in equity against duplicity in pleading, though there is at law. There is a great difference between bills to establish, and answers insisting on a modus. In *Scott v. Allgood* (c), the same modus was set out, both in the answer and in a cross bill filed by the defendants against the rector; the cross bill was dismissed for insufficiency in the statement of the modus, while the answer was established. *Ellis v. Saul* (d), and *Jenkinson v. Royston* (e), are authorities to shew that second alternatives in an answer may be rejected as surplusage. In *Chichester v. Price* (f), a modus was pleaded, payable "on or about" a certain day, and Lord *Lyndhurst* held the

(a) 1 Wood, 136.

(b) 1 Russ. & M. 529.

(c) 4 Gwill. 1369.

(d) 2 E. & Y. 360.

(e) 5 Price, 495; 3 E. & Y. 896.

(f) 2 Younge.

modus well laid, and rejected the words "or about" as surplusage. In *Williams v. Goodchild* (a), the defendant pleaded both title to tithe and exemption from tithe, and this was held to be good. The same thing was done in *Powell v. Powell* (b). Generally it is sufficient in this Court if a good defence can be collected from the terms of the answer. *Lamprey v. Rooke* (c), *Swyer v. Weld* (d), *Whitehead v. Flintoft* (e), *Harpur v. Salt* (f), *Bishop of Oxford v. Collins* (g), *Wetherhead v. Bradshaw* (h), *Dean and Chapter of Ripon v. Parker* (i), *Trin. Coll. v. Barington* (j), *Delves v. Lord Bagot* (k), *Bevor v. Taylor* (l), *Dean and Canons of Windsor v. Robinson* (m), *Uhthoph v. Lord Huntingfield* (n), *Prevost v. Bennett* (o).

1834.
 JESUS
 COLLEGE
 v.
 GIBBS.

Mr. Boteler, in reply.—The defendants have made the most of their defence, and this is not a case for the indulgence of the Court. The pleading in question is clearly alternative; it is not a second pleading of a modus. In *Ward v. Shepherd* (p), a case similar to the present, the pleader did not think himself at liberty to put this species of pleading on the record; in *Leach v. Bailey* (q), it was resorted to, and did not succeed. The Court expects clear pleading. The case of *Nagle v. Edwards* (r) stands alone; the parties there must have waived the objection. *Haywood v. Nicholls* (s) was a feigned issue under an inclosure bill, and is inapplicable; but in that case was cited

(a) 2 Eagle on Tithes, 367.

(b) 2 Wood, 166; 1 E. & Y. 765.

(c) Ambl. 291; 2 E. & Y. 148.

(d) 2 Wood, 18.

(e) 2 Wood, 462.

(f) 2 Wood, 468.

(g) 3 Wood, 359.

(h) 3 Wood, 426.

(i) 4 Wood, 122.

(j) 4 Wood, 279.

(k) 4 Wood, 298.

(l) 4 Wood, 506.

(m) 4 Wood, 545.

(n) 2 E. & Y. 649.

(o) 1 Price, 236; 3 E. & Y. 705.

(p) 3 Price, 608; 3 E. & Y. 795.

(q) 6 Price, 504; 3 E. & Y. 953.

(r) 3 Anstr. 702; 2 Eag. Tithes, 366, n.

(s) 3 Gwill. 1120; 3 E. & Y. 1272.

1834.

JESUS
COLLEGE
v.
GIBBS.

a case of *Smith v. Goddard*, where the defendant, having put in two answers, the first insisting on a modus, the second on a composition real, the Court held him to his first answer. On what grounds this was done does not appear; but it must have been on special grounds, because, from a note in *Gwillim* (a), it appears that that case was decided on special circumstances. *Franklin v. Holmes* (b) was a case at law, and turned on the question, what should be evidence of a composition. A class of cases has been brought forward, in which a modus has been insisted upon, but, if not a good modus, then a composition from year to year. Now in these cases the plaintiff is put to little or no difficulty; there are not, as there are in this case, distinct masses of evidence against the plaintiff: all the evidence would apply simply to the modus; and it is settled that the defendant cannot insist on a temporary composition if there is not a modus. Here there are two substantial defences; payment, either in one way or in another. Another class of cases has been adduced, of which the leading case is *Atkins v. Hatton* (c), and in which, it is said, the very point now before the Court was under discussion. Now the very contrary of this is the fact. The words "composition real" were mentioned in those cases, but the composition real was stated to have existed time out of mind. The Court in effect said, it is not a composition real; the defendants mean no more than an immemorial payment by way of composition. The form of the issue proposed in this case is conclusive; it was merely upon the modus. If a composition real had been taken into consideration, there would have been a double issue; namely, whether there was a composition real or a modus. In *Wilkinson v. Foot* (d), *Gurdon v. Sell* (e), and other

(a) 3 Gwill. 1122.

(c) 2 Anstr. 386; 2 E. & Y. 403

(b) 3 Gwill. 1129; 3 E. & Y. 1307.

(d) 1 Wood, 129.

(e) 1 Wood, 136.

cases, the word composition only is introduced. In *Travis v. Oxton* (a), the question was not whether the tilt penny was a good modus or not, but whether it had been paid as a modus or composition. [*Alderson*, B.—It was in fact to shew the extent of the endowment.] In *Skipwith v. Pickering* (b), and other cases relating to abbey lands, a general mode of pleading has been allowed; but, even then, they have not let in any general defence, but that of prescription, or immemorial grant. Another class of cases has been cited, in which it has been considered that the Court would reject the second alternative, or, where there was any uncertainty, reject the words which made the uncertainty. But, in the cases cited, the surplusage was of minor importance; as, for instance, where the expressions “on or about,” and “owners or occupiers,” had been used. Then *Williams v. Goodchild* (c), and *Powell v. Powell* (d), have been cited, to shew that it is allowable in the same defence to set up exemption from tithes and title to tithes. In *Williams v. Goodchild*, the defendant insisted that the lands in question were part of the glebe or demesne lands of the dissolved monastery of *St. Peter's, Westminster*, to whom the advowson and manor of *Hendon*, in which the lands were included, belonged; that these lands belonged to the monastery at the time of its dissolution; that the monastery held these lands discharged from tithes, or entitled to the tithes thereof; and that, after the dissolution, the advowson and manor of *Hendon* were granted in fee to the person under whom the defendant claimed. In this case, therefore, only that particular sort of exemption was pleaded, which arises from unity of possession; there was not any distinct allegation of exemption from tithes and title to tithes. Besides, it does

1834.

JESUS
COLLEGE
v.
GIBBS.

(a) 3 Wood, 523; 3 E. & Y.
1248.

(b) 1 Wood, 265.

(c) 2 Eagle on Tithes, 367.

(d) 2 Wood, 166; 1 E. & Y.
765.

1834.

JESUS
COLLEGE
v.
GIBBS.

not appear that any decree was ever made in this case. The case of *Powell v. Powell* is similar to that of *Williams v. Goodchild*. The union of chapel and lands within the abbey might exist in that case, as well as the union of manor and lands in the former case. But there was not an allegation of a distinct title to tithes, standing independent of the exemption which was claimed. Lastly, a variety of cases have been cited to shew that it is sufficient, if a good defence can be collected from the terms of the answer. Now, of these cases, *Whitehead v. Flintoft* (a) was a compromise; in *Beevor v. Taylor* (b), the defendant merely insisted on an annual composition; and, in almost all the other cases, an account was decreed. Upon the whole, no mode of pleading like the present has ever been allowed or established. The case of *Leach v. Bailey* (c) was decided on principles which ought to govern the present case; and *Horace's* rule, "*Denique sit quod vis simplex duntaxat et unum*," is here peculiarly applicable.

ALDERSON, B., at the close of the argument, observed, that the question of pleading, which had been raised, deserved much consideration, and he should postpone his judgment.

The cause was then argued upon the merits; but, as the judgment of the Court was ultimately given with reference solely to the question of pleading, the arguments on the merits are omitted.

In the course of the cause the defendants offered to read the evidence of *Thomas Gibbs*, who was a defendant in another suit instituted by the same plaintiffs for tithes in the same parish.

Mr. *Boteler*, for the plaintiffs, objected that the witness

(a) 2 Wood, 462.

(b) 4 Wood, 506.

(c) 6 Price, 504; 3 E. & Y. 953.

was incompetent. He had admitted in one of his depositions that he had entered into an agreement to bear a portion of the costs of this and certain other suits instituted by the plaintiffs for a similar purpose.

1834.
 JESUS
 COLLEGE
 v.
 GIBBS.

Mr. *Simpkinson*, and Mr. *Sidebotham*, *contra*.—The agreement is illegal, and amounts to maintenance, and is such as a Court of justice will not enforce. The agreement is not merely respecting this suit, but a variety of other suits mentioned in the deposition. Now jointly to defend a tithe suit, where the defences are of a distinct nature, is maintenance. *Oliver v. Bakewell*(a). The principle of that case applies to the present. The witness therefore cannot be considered as having a pecuniary interest, but only a moral bias, of which this Court will take no notice. But, supposing the agreement to be legal, and the witness liable for costs, still he would be rendered competent by the provisions of the 3 & 4 *Will.* 4, c. 42, ss. 26, 27 : and, if a bill were afterwards brought against him for contribution, as in *Stone v. Yea* (b), the record of the decree in the present suit, which must necessarily be produced on that occasion, would, by bearing the indorsement of his name, operate in his discharge. A decree of this Court is equivalent to a judgment at law.

ALDERSON, B.—There is no doubt that the evidence of this witness is not admissible. Upon the first point, if an action were brought against him, he could not set up his own maintenance in bar of the action ; nor can he say in this Court, I have done an illegal act, of which I shall avail myself. As to the second point, the case is not within the act. The witness is certainly interested in the result of the suit ; but the act only applies to results which may be given in evidence between parties who are privy in estate,

(a) 4 Gwill. 1381.

(b) Jacob, 426.

1834.

JESUS
COLLEGE
v.
GIBBS.

or connected by some custom. This is the ordinary case of a person interested directly in the event of a suit. He may lose or gain, according as the suit succeeds or fails; and that is not provided for by the act, nor was it ever intended (*a*).

Upon the defendants offering to put in evidence a copy of the rector's book, the original of which had been produced by Mr. *Hopkins*, Mr. *Boteler* objected to its reception, the defendants having in their possession the original book: at all events, if this evidence were entered as read, the defendants must pay the costs.

Mr. *Simpkinson*, *contrà*, contended that it was necessary for the defendants to be prepared with the secondary evidence, inasmuch as the witness might have refused to produce the book.

ALDERSON, B.—You could not have proved it by secondary evidence, unless the document had been in the possession of a party not bound to produce it. You cannot produce secondary evidence of a document, if a witness *refuses* to produce the original. He does it, it is true, at his own peril; but you have no remedy, except an action against him. He is liable to make good to you in damages the loss which you have sustained. I do not mean to say that you have not adopted a rational course; but you, having the original, must pay the costs of your extra precaution.

Jan. 16th.

ON this day the cause stood for judgment.

ALDERSON, B.—There are two questions in this case. The one preliminary, depending on the alleged inaccuracy

(*a*) See *Braithwait v. Colcman*, 2 Harrison's Index, 1046.

of the pleadings; and the other, whether, supposing the pleadings to be sufficient, the Court on the merits ought to decree in favour of the plaintiffs, or direct an issue to try the validity of the moduses on which the defendants rely.

The plaintiffs contend that, on the pleadings as at present framed, they are entitled to a decree, inasmuch as the defence set up by the answer is wholly ambiguous, and calculated to mislead them; and, consequently, that I ought not to allow the defendants to go into proofs to establish either branch of the defence. On this point numerous cases have been cited, and I have had considerable difficulty in coming to a conclusion upon them. I think, when we advert to the course of the proceedings in a Court of equity, that some restriction of this kind seems well founded in principle. The fact, that a defendant is obliged to swear to the truth of his answer, would of itself necessarily exclude inconsistent statements. For how could a defendant be permitted to attest, by his oath, the truth of two statements wholly irreconcilable with each other? But, although this would be impossible to be permitted, on account of the perjury which would thereby be introduced, it would not necessarily follow from thence that an alternative statement might not be allowed. For a party might swear truly enough that the fact was either in one or the other of two ways. The difficulty, however, would be that then there is in truth no answer at all upon oath. For no one can affirm that the defendant means to swear really to his belief as to either the one or the other of the two branches of the alternative. I think, therefore, that, upon principle, such an answer must be bad; for a statement of two or more inconsistent propositions in the alternative is only a mode of making two inconsistent statements upon oath, without incurring the guilt or running the risk of perjury. Besides, if two inconsistent statements are to be thus allowed, being put as branches of one alternative proposition, it is impos-

1835.

JESUS
COLLEGE
v.
GIBBS.

1835.

JESUS
COLLEGE
v.
GIBBS.

sible not to see that any number would fall within the same rule; and the whole advantage, if there be any, of a statement on oath by the defendants' answer to the plaintiffs' bill would be lost, by a most obvious evasion, under the authority of the Court. Unless, therefore, some clear and distinct decision of a Court of equity could be produced, establishing the propriety of such an alternative statement in an answer, I should be disposed to decide against it.

Let us then examine the authorities, and see how far they are conclusive upon this question.

I can lay no stress upon the cases of *Haywood v. Nichols* (a), and *Franklin v. Holmes* (b), because, being issues directed out of the Court of *King's Bench*, they appear to me to have no bearing at all on this point.

The other cases may be ranged under different divisions, as, where, on the pleadings, an immemorial payment is alleged, which is called, in some cases, a modus or composition; *Atkins v. Lord Willoughby de Brooke* (c); or an immemorial composition real or modus; *Atkins v. Hatton* (d). Instances of such pleading are also to be found in *Wilkinson v. Foot* (e), and *Travis v. Oxton* (f). But all those cases are materially distinguishable from the present. They are all instances of immemorial rights. In truth, a modus and an immemorial composition real are established by precisely the same evidence, and there is no solid distinction between them. Such vagueness of statement is allowed, because no one can be supposed to know the original nature of a right which commenced before the time of legal memory.

Then there is the case of abbey lands, in which, ac-

(a) 3 Gwill. 1120; 3 E. & Y. 1272.

(b) 3 Gwill. 1129; 3 E. & Y. 1307.

(c) 2 Anstr. 397; 2 E. & Y. 406.

(d) 2 Anstr. 386; 2 E. & Y. 403.

(e) 1 Wood, 129.

(f) 3 Wood, 523; 3 E. & Y. 1248.

according to Lord *Hardwicke*, in *Lamprey v. Rooke* (a), followed afterwards by *Skipwith v. Pickering* (b), *Humphreys v. Wagstaff* (c), and other authorities, it is allowable to state the discharge generally by prescription or some other lawful means; but this is an indulgence arising out of the statute, which gave the exemption in general language. It seems, therefore, to be taken as a rule in pleadings in equity, contrary to the case of *Slade v. Drake* (d) at law, that an answer stating that the lands in the hands of the abbey at the time of the dissolution were held discharged of tithes, would be sufficient. And certainly, if that were so, the expression that they were discharged by prescription, or some other lawful means, would not alter the case. In the present case it would not be sufficient for the defendants to plead that their lands were discharged, because they are required to shew, by their answer, *how* they are discharged. This class of cases, therefore, seems to me to be distinguishable also. In this class I include also the cases of *Williams v. Goodchild* (e), and *Powell v. Powell* (f); for the title there set up must, I think, have been a title in the abbey, both to the tithes and to the lands titheable. In other words, a discharge, either by immemorial unity or by prescription, was there allowed to be pleaded in the case of abbey lands.

There is another class of cases in which the defendants have been allowed to make and to state two grounds of defence—one a *modus*, another a composition undetermined by notice; such are the cases of *Atkins v. Lord Willoughby de Brooke* (g), and *Wolley v. Brownhill* (h). But there, no inconsistent facts are stated in the answer. The defendant

(a) Ambl. 291; 2 E. & Y. 148.

(b) 1 Wood, 265.

(c) 1 Russ. & M. 529.

(d) Hob. 295; 1 E. & Y. 314.

(e) 2 Eagle on Tithes, 367.

(f) 2 Wood, 166; 1 E. & Y. 765.

(g) 2 Anstr. 397; 2 E. & Y. 406.

(h) M'Clelland, 317; 3 E. & Y. 1152.

1835.

JESUS
COLLEGE
v.
GIBBS.

1835.

JESUS
COLLEGE
v.
GIBBS.

avers the existence of an immemorial payment, and that no notice has been given to determine it. The latter fact is immaterial, if the point be proved; it may become material if the Court give credit to the plaintiffs' case. But there is no inconsistency between the facts stated in the answer. Both may be true. This naturally brings me to that class of cases in which it is laid down that the defendant may deny the plaintiff's title, and also set up a defence against it. *Carte v. Ball*(a) is an instance of this being done. But here, also, there is no inconsistency. The defendant is not called upon to admit or deny the plaintiff's case; he may be wholly ignorant of it; and it is sufficient, if he can truly state this, to call on the plaintiff to prove it to the satisfaction of the Court. Nor, indeed, if the defendant denied the plaintiff's title, would there be any real inconsistency in afterwards pleading an exemption. For it may be quite true that another person, and not the plaintiff, is *prima facie* entitled to the tithes, and that against such other person the defendant has a good defence. Nothing in such a case as this is opposed to the principle which I set out with in this examination, that an answer is bad which either contains inconsistent defences, or an alternative of inconsistent defences, which would only be the same thing in an evasive mode.

There remain only a series of instances which have been adduced of similar pleadings. *Swyer v. Weld*(b), *Wetherhead v. Bradshaw*(c), *Trinity College v. Barrington*(d), *Dean and Chapter of Ripon v. Parker*(e), *Dean of Windsor v. Robinson*(f), where it is said similar objections might have been taken. We cannot tell whether they were taken or not; but certainly in all the above cases the plaintiffs succeeded. I cannot, therefore, treat

(a) 3 Atk. 496; 2 E. & Y. 103.

(b) 2 Wood, 18.

(c) 3 Wood, 426.

(d) 4 Wood, 279.

(e) 4 Wood, 122.

(f) 4 Wood, 545.

these as authorities. *Whitehead v. Flintoft* (a), and *Delves v. Lord Bagot* (b), seem to have ended by some compromise between the parties. The former, indeed, may have turned on the failure of the proof as to the plaintiff's title; and, if so, the correctness or incorrectness of the defendant's answer would have become immaterial. I have not adverted to the cases of moduses pleaded as payable by the owners or occupiers, because I do not think that an alternative pleading in the sense here meant. Nor do I mention the case of *Prevost v. Benett* (c), except to say that there the modus seems to have been correctly pleaded.

Upon the whole, then, I can find no case out of the numerous decisions which the great industry of the defendants' counsel has brought before me, which seems at variance with the principle with which I set out.

On the other hand, however, I find a direct and plain authority in accordance with it. I allude to the case of *Leech v. Bailey* (d), where Lord Chief Baron *Richards*, whose long experience in Courts of equity entitles his judgment to peculiar weight, expressly decided that such alternative pleading was bad, and could not for a moment be allowed. Founding myself, therefore, on the principle supported by one clear authority, and not contradicted, as it seems to me, by any of the various authorities cited, I have come to the conclusion that an answer so framed is bad, and cannot be sanctioned by the Court.

But, then, is that the case here? This answer first states several moduses, as having been immemorially paid in the usual form, and then proceeds thus:—"And these defendants say that they insist upon such payments as moduses; but in case such payments, for any reason, be not good and valid moduses, or a good and valid modus,

(a) 2 Wood, 462.

(c) 1 Price, 236; 3 E. & Y. 705.

(b) 4 Wood, 294; 3 E. & Y. 1331. (d) 6 Price, 504; 3 E. & Y. 953.

1835.

JESUS
COLLEGE
GIBBS.

from time immemorial, which they do not admit, then they insist that the same must be taken to have been payable as or by virtue of good and valid real compositions, or a good and valid real composition, made by and with the assent of all parties, whose concurrence or assent was necessary therein or thereto, and before the restraining statute made and passed in the 13 *Eliz.*"

Now this appears to me liable to the above objection. The payment is in truth pleaded, *first*, as immemorial, and so a modus; and, *secondly*, as not immemorial but good as a real composition before the 13 *Eliz.*, and after *Rich. 1.* Now, can a party be allowed to swear that it is either immemorial or not immemorial, and yet good either way? For the reasons I have above given, I think he cannot do so.

Can I, then, reject this latter part as surplusage? Various authorities have been cited for this purpose. In *Ellis v. Saul* (a), a modus was not correctly stated, and the Court permitted the words "a short time before 13th February," which caused the ambiguity, to be struck out. Again, in *Jenkinson v. Royston* (b), redundant words were treated in the same way. In *Uthoff v. Lord Huntingfield* (c), the Court, in order to attain the justice of the case, went still further. There the modus was pleaded as payable from time immemorial to the rector of the united parishes of *H.* and *C.*, and the union of the parishes was within legal memory. The Court, however, directed an issue whether, from time immemorial, the modus had been payable to the rector of *H.* till the union, and afterwards to the rector of *H.* and *C.* But these are all cases of verbal inaccuracy, and could not have embarrassed the plaintiff in conducting his case; they resemble the case in which I have just given judgment, of an incorrectness in the schedule as to the east district, in respect of which the modus is paid.

(a) 1 Anstr. 332; 2 E. & Y. 360. (b) 5 Price, 495; 3 E. & Y. 896.

(c) 1 Price, 237; 2 E. & Y. 649.

There remain only the two cases of *Nagle v. Edwards* (a), and *Leech v. Bailey* (b), which are in direct opposition to each other as to this point. In the former the Court allowed the defendant to go into the case, notwithstanding he had pleaded inconsistent defences. In the latter, Lord Chief Baron *Richards* made a decree for an account on this very ground; and, as such a decree is not conclusive on the subject, I think that the latter is the best precedent for me to follow. It is to be observed that, in *Nagle v. Edwards*, the Court might be influenced to give the defendant the indulgence of being heard, by their desire to settle the question in future, which they did, by ultimately making a decree for the plaintiff on the merits. If in the case before me, the defendants' evidence had wholly failed to set up a *modus*, I should probably have contented myself with determining the case on that ground alone. But the evidence of the defendants in that respect is such as might not improbably have induced me to direct an issue. I have not arrived at so clear an opinion on that point as to induce me to decide at once in favour of the plaintiffs.

Upon the whole, I think that, on the preliminary objection, I ought to make a decree, directing an account to be taken of the tithes due, and that the decree should be with costs, but with liberty to the defendant to have this specially so stated, that, in case there be any further litigation on this point, the present decision may not prejudice them as to the merits.

This will decide all the questions in the other cases (c), and makes it unnecessary to distinguish the case against *Thomas Gibbs* from the rest.

- (a) 3 Anstr. 702; 2 E. & Y. 427. suits between the same plaintiffs
 (b) 6 Price, 504; 3 E. & Y. 953. and other defendants.
 (c) There were several other

1835.

JESUS
COLLEGE
v.
GIBBS.

1834.

Dec. 12th.

HADOW v. BARNETT and Others.

Where a modus is laid with exceptions, it may be proved by some witnesses who speak to a general modus, and others who speak to the exceptions.

A second set of depositions taken upon the same interrogatories, rejected.

Semble, that the decision in *Willis v. Stone*, 1 Y. & J. 262, is questionable.

THIS was a tithe suit, and the defendants set up various moduses. Of these, one was laid as a modus for all tithes except the tithes of milk and of wood, and with some other specified exceptions. With a view to prove this modus, one of the witnesses deposed to a modus covering every description of tithes whatever. It was objected that his evidence could not be read, as he proved a totally different modus from that which had been laid in the answer: but *per*

ALDERSON, B.—I think it can be read, *valeat quantum*. In some cases the Court could not admit evidence of this nature, because it did not know to what point the evidence was to be directed. Here the defendant says he can prove the general modus by some witnesses, and qualify it by others.

In the same suit a witness had been examined in the country for all the defendants, except *Joseph Barnett*, and had afterwards been examined in *London* upon the same interrogatories, for all the defendants. It was stated at the bar that there was a total variance between the depositions taken on the first, and those taken on the second examination; and it was submitted that the second depositions must be rejected, except perhaps as they related to the defendant *Barnett*.

The Court admitted the depositions as they related to the defendant *Barnett*, and rejected them as to the other defendants.

In the same suit Mr. *Boteler* for the defendants, observed, that inasmuch as the defendants had not by their

answer alleged any special custom in support of the exemption claimed by them from payment of tithes for wood cut for fuel and husbandry purposes, he apprehended they could not resist a decree for the tithe of wood. That in *Willis v. Stone* (a), it had been decided that wood cut for husbandry purposes is liable to the payment of tithes, unless there is a special custom to the contrary; but he said, that the decision in that case, though it had been followed in other instances, was a very questionable one, and had never been approved by the profession.

1834.
HADOW
v.
BARNETT.

ALDERSON, B., apparently assented to this observation, but said, that if the case should ultimately turn upon this point, it would be better that he should decide it upon the authority of *Willis v. Stone*, and that the defendants should carry the case to the House of Lords, upon appeal from his decision.

It did not, however, become necessary to decide this point, the defendants failing in their defence, for want of evidence.

Mr. *Simpkinson*, Mr. *Duckworth*, and Mr. *Younge*, for the plaintiff.

Mr. *Boteler*, Mr. *Wigram*, and Mr. *Perry*, for the defendants.

(a) 1 Y. & J. 262.

1834.

Dec. 23rd. *Ex parte* NORTHWICK—In the Matter of the LONDON and BIRMINGHAM RAILWAY COMPANY.

Where an act of Parliament establishing a railway company, authorized the company to purchase lands of corporations, tenants for life, &c., and directed that the purchase-money should be applied in the redemption of the land-tax upon other parts of the property unsold:—*Held*, that a tenant for life, who had redeemed the land-tax before the passing of the act, might reimburse himself out of the proceeds of the lands purchased of him by the company.

The costs of an application to the Court under such an act of Parliament, to have the purchase-money applied in the redemption of the land-tax, will be allowed out of the purchase-money, although the act only makes an express provision for such costs in cases where the money is to be laid out in the purchase of lands to be settled to the like uses.

THE petitioner, Lord *Northwick*, was tenant for life, under certain settlements, of considerable estates in the parish of *Harrow*. In the years 1806, 1808, and 1812, he redeemed the land-tax upon several portions of these estates, and the aggregate amount of the several sums paid for the redemption was 1124*l.* 16*s.* 1*d.*

By the 3 *Will.* 4, c. xxxvi., the *London and Birmingham Railway Company* are empowered to purchase lands for that undertaking, of corporations, tenants for life, tenants in tail, &c. The word “lands,” by the terms of the act, includes “tenements and hereditaments.”

Under the 40th section of the act, the money to be paid for the purchase of any land of any corporation, tenant for life, &c., shall, if it exceed 200*l.*, be paid into the Bank of *England*, in the name and with the privity of the Accountant-General of the Court of *Exchequer*, according to the provisions of the stat. 1 *Geo.* 4, c. 35; there to remain until the same shall, by order made upon petition in the Court of *Exchequer*, be applied either in the purchase or redemption of the land-tax, or in the discharge of any debt or other incumbrance affecting the said lands, or affecting other lands standing settled to the same uses; or until the same shall by a like order be laid out in the purchase of other lands to be settled to the like uses, as the lands which shall be so purchased stood settled or limited.

The 41st section enacts, that where, by reason of any disability or incapacity of any party entitled to the lands to be taken by the Company, the purchase-money shall be required to be paid into the Bank of *England*, to be applied in the purchase of other lands to be settled to the like uses, it shall be lawful for the Court to order the

expenses of such purchases, together with the necessary costs and charges of obtaining such order, to be paid by the Company out of the monies to be received by virtue of the act.

1834.
Es parte
NORTHWICK.

The petition stated that the petitioner had contracted with the Company for the sale to them of some parts, and the enfranchisement of other parts, of the settled lands; and that in pursuance of those contracts, and by virtue of the act, the Company had paid into the Bank of *England* two sums, amounting together to 1776*l.* 17*s.* 4*d.*, which were then standing in the name of the Accountant-General. The petition likewise stated that the sum of 1124*l.* 16*s.* 1*d.*, so paid for the redemption of the land-tax, was advanced by the petitioner out of his own proper monies; and he submitted that the same having been expended for the benefit of the estates, he was entitled to be repaid the amount.

The petition prayed, that, out of the said sum of 1776*l.* 17*s.* 6*d.*, the Accountant-General might be directed to pay to the petitioner the sum of 1124*l.* 16*s.* 1*d.*, in repayment of the sums advanced and paid by him for the redemption of land-tax on parts of the said settled estates, as aforesaid; that he might be directed to pay the residue to the receiver-general, for the purpose of redeeming the land-tax on other parts of the said estates; and that it might be referred to the Master to tax the petitioner his costs, charges, and expenses of this application, and incidental thereto; and that such costs, when taxed, might be paid to the petitioner by the said company, &c.

Mr. *Lovat*, for the petition.

Mr. *Younge*, for the Company, expressed a doubt whether the petitioner could claim to be repaid what he had laid out in the redemption of the land-tax before the passing of the act. If he could, then another question was, whether, under the terms of the act, the petitioner was entitled to

1834.

Ex parte
NORTHWICK.

the costs of this application? According to the act, costs were only to be allowed when the money was to be laid out in the purchase of lands to be settled to the like uses. Here the residue of the money, after repayment to the petitioner, was to be applied to redeem the land-tax on other parts of the estates.

The LORD CHIEF BARON said, he thought the application came within the spirit of the act, and granted the petition.

MEMORANDA.

ON *Friday*, the 21st *November*, 1834, Lord *Brougham* resigned the Great Seal, which was on the same day delivered by his Majesty to Lord *Lyndhurst*, who for some weeks afterwards continued to hold the office of Lord Chief Baron, together with that of Lord High Chancellor of *England*.

On *Tuesday*, the 23rd *December*, Lord *Lyndhurst* sat as Chief Baron in the Equity Court for the last time. On the rising of the Court, his Lordship announced to the bar that it was the last day of his sitting in that Court, and briefly expressed his acknowledgments for the attention he had uniformly received from the members of the bar practising in this Court. Upon which Mr. *Boteler* addressed his Lordship as follows: ‘As your Lordship will not sit here again, I trust you will permit me, before you leave this Court, to express to your Lordship the deep sense which the Counsel practising at this bar entertain of the kindness and attention which they have uniformly experienced from your Lordship, during the time you have presided in this Court. I may truly assure

your Lordship, that the advantages they have derived can never be forgotten."

1834.

MEMORANDA.

During the vacation after *Michaelmas* Term, Sir *James Scarlett*, Knt., was appointed by his Majesty to the office of Lord Chief Baron of the Court of *Exchequer*, and was called to the degree of the coif, and gave rings, with the motto "*Ingenuas per artes*," and was soon afterwards created a Peer by the title of *Baron Abinger*, of *Abinger* in the county of *Surrey*, and of the city of *Norwich*.

Lord *Plunkett* resigned the office of Lord High Chancellor of *Ireland*, and was succeeded by Sir *Edward Burtenshaw Sugden*, Knt.

Frederick Pollock, Esq., one of his Majesty's Counsel, was appointed to the office of Attorney-General, vacant by the resignation of Sir *John Campbell*, and was knighted; and *William Webb Follett*, Esq., was appointed to the office of Solicitor-General, vacant by the resignation of *Robert Monsey Rolfe*, Esq., and was knighted.

His Majesty was pleased to appoint the following gentlemen to be his Counsel learned in the law, namely, *Charles Henry Barber*, *William Burge*, *Edward Jacob*, *Fitzroy Kelly*, *Richard Torin Kindersley*, *John Miller*, *Thomas Joshua Platt*, *Henry John Shepherd*, *Walker Skirrow*, *George Spence*, *Christopher Temple*, *Daniel Wakefield*, and *James Wigram*, Esquires. Accordingly, in the course of *Hilary* Term, 1835, they were severally called within the bar of the various Courts.

On *Sunday*, the 11th *January*, 1835, being the day before the commencement of *Hilary* Term, Mr. Justice *Taunton* died. He was succeeded in his office of one of the Justices of the Court of *King's Bench*, by *John Taylor Coleridge*, Esq., Serjeant at Law, who was thereupon knighted.

1835.

Jan. 16th.

BRYAN v. PARKER.

A double issue may be directed to try the validity of a farm modus; the inquiry being,
 1. As to the existence of the ancient farm.
 2. As to the payment of the modus.

MOTION to vary the minutes of the decree. The bill was filed by the rector of *Woodham Waters, alias Woodham Walter*, in the county of *Essex*, for an account of the tithes of lands in the defendant's occupation. The defence was a modus, which was stated in the answer in the following manner:—"That from time whereof the memory of man is not to the contrary, there hath been, and is now, situate within the parish of *Woodham Waters*, otherwise *Woodham Walter*, a certain ancient farm, or tract of land, heretofore called or known by the name of the *Park Lands*, formerly the estate of *William Fytche*, Esq., afterwards of *Thomas Fytche*, Esq., containing in the whole 917 acres, 1 rood, and 29 perches, or thereabouts, and comprising the several pieces or parcels of land, set forth and particularly described in the first schedule to this defendant's answer annexed. And this defendant further saith, that from time whereof the memory of man is not to the contrary, a certain good and lawful usage hath been established, whereby the rector for the time being of the said parish of *Woodham Waters*, otherwise *Woodham Walter*, became, and hath always been, and now is, entitled to, and ought to accept from the occupiers of the said lands comprised in the said schedule, and the said occupiers are liable to pay, and ought to pay, and have been accustomed to pay to the said rector, at *Michaelmas* old style in every year, a certain modus or ancient customary payment of 1*l.* 6*s.* 8*d.*, for and in lieu and in full satisfaction of the tithes of all and singular the titheable matters and things yearly arising, growing, renewing, and increasing, in and upon the said lands comprised in the said schedule."

The cause came on to be heard in *February*, 1834, before Lord *Lyndhurst*, C. B., when an issue was directed

to try the validity of the *modus*. The issue was drawn up in the terms of the answer, but was in a double form: namely, *first*, whether from time, &c., there hath been and now is situate within the parish of *Woodham Waters*, otherwise *Woodham Walter*, in the pleadings of this cause mentioned, a certain ancient farm, &c.; and, *secondly*, whether from time, &c., a certain good and lawful usage hath been established, &c.

1835.

BRYAN
v.
PARKER.

The object of the present motion was to make the issue single, by reducing it into the following form; namely, Whether from time, &c., a certain good and lawful usage hath been established, whereby the rector for the time being of the said parish of *Woodham Waters*, otherwise *Woodham Walter*, became, and always has been, and now is, entitled to and ought to accept from the occupiers of a certain ancient farm or tract of land, heretofore called or known by the name of the *Park Lands*, containing in the whole 917 acres, 1 rood, and 29 perches, or thereabouts, and comprising the several pieces or parcels of land set forth and particularly described in the first schedule annexed to the defendant's said answer, put in to the said plaintiff's bill; and the said occupiers are liable and ought to pay, and have been accustomed to pay to the said rector at *Michaelmas* old style in every year, a certain *modus* or ancient customary payment of 1*l.* 6*s.* 8*d.*, for and in lieu and in full satisfaction of the tithes of all and singular the titheable matters and things yearly arising, growing, renewing, and increasing, in and upon the said lands comprised in the aforesaid schedules.

Mr. *Boteler*, for the motion.—In *Bree v. Beck* (a), the answer was stated in the same way as in this case, and the issue was directed as a single issue. *Bailey v. Sewell* (b), before Sir *Thomas Plumer*, is the only case to the con-

(a) 1 Younge, 211.

(b) 1 Russ. 239.

1835.

BRYAN
v.
PARKER.

trary. In a late case before the Vice Chancellor, his Honour was pressed to direct an issue in the double form; but he refused to do so, and said that the decree in *Bailey v. Sewell* was wrong. Upon appeal to Lord *Lyndhurst*, his Lordship was of the same opinion, and observed, that if the double issue were allowed, you might as well, upon an issue *devisavit vel non*, add an inquiry as to the particulars of attestation, or the state of mind of the testator.

Mr. *Jervis*, *contrà*, said, that there was no pretence for this application. The proposed issue assumed that there was an ancient farm, whereas that was the first thing to be proved at the trial.

The LORD CHIEF BARON.—I know from my own experience at *Nisi Prius*, that issues of this nature are frequently very difficult to be comprehended. If the proposed issue had been put in such a form, that no Judge or jury could doubt about it, I should have had no objection to the alteration. But it is not suggested that any real advantage will be gained by the change; and I think the two issues cannot be misunderstood. I shall therefore refuse the application; but as there are cases in its favour, it must be without costs.

Jan. 15th, 16th,
23rd.

TARLETON v. HORNBY and Others.

In general an
uncertificated
bankrupt cannot
file a bill against
his assignees for
an account of

their dealings under the bankruptcy; nor can the bankrupt obtain this relief indirectly, by charging fraud and collusion between the assignees and a third party, where the bill states no specific acts of fraud on the part of the assignees, and prays no relief against them on the ground of fraud.

THE bill stated that, previous to the year 1802, the plaintiff had been in partnership with *Daniel Backhouse* and others, and that they purchased plantations in the

West Indies, as part of the partnership assets. That the partnership was dissolved in 1802; and that, in *March*, 1808, a deed was executed, whereby *Backhouse* sold to the plaintiff all his interest in the partnership for the sum of 40,000*l.*, to be secured by different bonds. That, soon after the execution of this deed, the plaintiff had discovered that he had been imposed upon by *Backhouse*; that the liabilities of the partnership had been greater, and the value of the property less, than had been supposed; and that *Backhouse* knew of this before he executed the deed. That the plaintiff, accordingly, instituted proceedings in *Chancery* to set aside the deed, and that an issue was directed to try its validity; but that, owing to the absence of the plaintiff's leading counsel, and other circumstances, the verdict was found against him, establishing the deed. That, in *March*, 1815, the plaintiff, being on the point of embarking for *Holland*, in order to effect some beneficial arrangements for the partnership estate, executed certain conveyances of his real and personal estate, for the benefit of his wife and children; and that, in the same month, he proceeded to *Rotterdam*. That, immediately after his departure, the executors of *Backhouse*, who was then dead, being desirous of depriving the plaintiff of the means of unravelling the fraudulent conduct of *Backhouse*, and preventing the plaintiff from setting aside the deed of *March*, 1808, entered into a conspiracy to ruin the plaintiff; and, in order thereto, sued out a commission of bankrupt against him; and that two of the executors caused themselves, together with the defendant *Barnes*, to be made assignees under the commission; that there was collusion between the plaintiff's eldest son, the defendant, *John Collingwood Tarleton*, and the assignees; and that, by their joint fraudulent contrivances, they procured the deeds of 1815 to be set aside; and likewise, by means of an order in the alleged bankruptcy, procured the sale of the plaintiff's interest in

1835.

TARLETON
v.
HORNBY.

1835.

TARLETON
v.
HORNEY.

an estate, called the *Collingwood Estate*, to *J. C. Tarleton*, at an undervalue ; which estate the said *J. C. Tarleton* afterwards mortgaged to the assignees of *Backhouse*. That the assignees had received divers large sums of money on account of the plaintiff's estate and effects, much more than sufficient to pay the debts, which, in fact, had been paid in full, with interest. That the plaintiff had frequently applied to the defendant, *John Collingwood Tarleton*, to deliver up possession of the estate so purchased, and to account for the rents and profits ; and that he had also applied to the assignees to come to an account, and pay him the surplus ; but that the defendants had refused to comply with such requests.

The bill contained many general charges of fraud and collusion against the defendants ; and, amongst other things, it charged that they conspired to prevent the plaintiff from returning to *England* ; the son representing to him that his return would expose him to penalties for nonsurrender under the bankrupt laws, but that, if he continued to absent himself, an arrangement might be effected with his creditors.

The bill contained an allegation, that all the debts proved under the commission had been fully paid and satisfied by and out of the plaintiff's estate and effects, and the proceeds thereof ; and that, after payment thereof, there remained, and does now remain, or ought to remain, in the hands of the said assignees, a large balance or surplus of the plaintiff's estate and effects.

The bill prayed that the said defendants, the assignees, may, under the decree of this Court, account for all and singular the real and personal estates and effects of the plaintiff, which have been possessed or received by them under the commission, or which, but for their wilful neglect or default, might have been received, and of their application thereof ; and that they may be charged and made liable to answer for all loss or damage arising from

the improper sale and disposition thereof, or any part thereof; and may be decreed to pay and transfer to the plaintiff the surplus thereof which may remain, after payment and satisfaction of all the debts proved under the said commission, and all interest payable thereon respectively, and the expenses of the commission; and that the aforesaid sale to the said *J. C. Tarleton* may be declared fraudulent and void as against the plaintiff; and that the last-named defendant may account for the rents, profits, and produce of the *Collingwood Estate*; and that all necessary directions may be given for effectuating the several purposes aforesaid, and for general relief.

To this bill, which was filed against the assignees and *John Collingwood Tarleton*, and no other party, *James Barnes*, one of the assignees, put in a general demurrer for want of equity.

Mr. Rolfe, *Mr. Spence*, and *Mr. Booth*, in support of the demurrer.—For the purpose of sustaining this demurrer, we must admit the truth of all the facts stated in the bill to their fullest extent. We must admit that all the debts have been paid; that there is a large surplus; that the property has been sold at an undervalue; and all the other allegations contained in the bill. There is great difficulty in this, no doubt; but the answer is, your course is simple, you have a *festinum remedium*, to which you are bound to recur; you have no right to file a bill against the assignees to account in a Court of equity. It is not to be contended that, under very special circumstances, the bankrupt may not file a bill against his assignees. On a particular occasion Lord *Hardwicke* permitted it; but he did it with a view to get the judgment of the House of Lords. In general, however, there is no choice given to the bankrupt, either to come here, or to seek his remedy under the bankruptcy: and, even if there was such a discretion, the present would be considered an exception; for

1835.

TARLETON
v.
HORNBY.

1835.
 TARLETON
 v.
 HORNBY.

it would amount to the most gross oppression, to call assignees to an account for transactions of twenty years' standing. The bankrupt, under the first Bankrupt Acts, was treated as a criminal, and the whole of his property was placed at the disposal of his assignees. But, by the fourth section of 13 *Elix.* c. 7, the commissioners shall, upon request made by the bankrupt, not only make a true declaration to the bankrupt of the employing and bestowing of the lands, tenements, goods, and chattels paid and satisfied to the creditors, but also make payment to the bankrupt of the overplus. The commissioners, therefore, were to administer the property, subject to the controlling power of the Lord Chancellor. There was no application to the Lord Chancellor, except where there had been a previous application to the commissioners. The statutes of *James* were to the same effect (*a*). As regards the surplus, these were the only acts in force at the issuing of this commission, and by these acts only was the bankrupt entitled to the surplus. It is clear, therefore, there was abundant jurisdiction before the commissioners and the great seal. But it was said on a former occasion that the purchase by *John Collingwood Tarleton* made a difference. That is not so; for, if a party fraudulently conspires with the assignees, he brings himself within the jurisdiction in bankruptcy; and, when once under that jurisdiction, he remains so. *Ex parte Pease* (*b*). Besides, it is stated in the bill that *John Collingwood Tarleton* purchased under an order in the bankruptcy; therefore, upon the specialties of this case, independent of the general question of jurisdiction, the bill will not lie. The natural and obvious remedy was by petition to supersede the commission. To this end the bankrupt was bound to conform to the bankrupt laws, and surrender himself. Is it to be said that

(*a*) 1 Jac. 1, c. 15, s. 3; 21 Jac. 1, c. 19, s. 3.

(*b*) 1 Rose, 232.

1835.

TARLETON
v.
HORNBY.

you cannot have the obvious remedy without surrendering; but, if you take another extraordinary remedy, this condition may be dispensed with? Besides, the bill does not merely pray for the surplus, admitting all the proceedings in the bankruptcy, but it seeks to have the whole account taken again, which has been taken before a court of competent jurisdiction. To entertain this bill, therefore, would be to make this Court a court of appeal from the jurisdiction in bankruptcy. In *Kirkpatrick v. Dennett* (a), the bare notion of administering bankruptcy in the Court of *Exchequer* was considered by Sir *John Leach* as an absurdity. All the authorities are against this bill: *Clarke v. Capron* (b), *Spragg v. Binks* (c), *Hammond v. Atwood* (d). The case, however, which is most directly in point, is that of *Saxton v. Davis* (e), which is not distinguishable from the present. In that case it does not appear whether the debts were all paid or not, but the payment of the debts can make no difference in the principle; for, if this Court could entertain such a bill, a creditor would have the same right to apply here in case the debts were not paid, as the bankrupt would have in case of a surplus.

Upon the whole, therefore, the Court will not decree this account; and there being no other relief besides account prayed against the assignees, they ought not to have been made parties. It is true, the bill states the order in bankruptcy under which the sale to *J. C. Tarleton* took place, and charges the assignees with collusion in the sale; but it prays no costs against them; and it is clear that, if a person, against whom no particular relief is prayed, is made a party to a bill on the ground of fraudulent collusion, the plaintiff must pray costs against him, or a demurrer will lie: *Le Texier v. Margravine of Aspach* (f).

(a) 1 S. & S. 411.

(b) 2 Ves. jun. 666.

(c) 5 Ves. 583.

(d) 3 Madd. 158.

(e) 18 Ves. 72; 1 Rose, 70.

(f) 15 Ves. 159.

1835.
 TARLETON
 v.
 HORNBY.

There are also grounds of demurrer *ore tenus*. It is alleged by the bill that *John Collingwood Tarleton*, after purchasing the property in question, suffered a recovery, and mortgaged it to the executors of *Daniel Backhouse*. They ought, therefore, to have been made parties to the suit. The children of the bankrupt, who, it is alleged, took interests in the property under the deeds of 1815, ought also to have been made parties.

Mr. *Simpkinson*, Mr. *Kindersley*, and Mr. *Wigram*, in support of the bill.—The bill is consistent with the principles of a Court of equity. It has two objects: one to call the assignees to account for the surplus which they have in hand, and to make them answerable for their malpractices in the administration of the bankrupt's effects; the other, to set aside a fraudulent sale of part of the estates of the bankrupt. It is said that the plaintiff's only mode of proceeding is in the bankruptcy; that all the interest of the bankrupt is divested by the assignment; and that it is only under certain clauses in the Bankrupt Act that he has any property at all. This is irreconcilable with Sir *William Grant's* decision in *Charman v. Charman (a)*, in which it was held that a devise is revoked only *sub modo* by the bankruptcy of the devisor. But it is said that the plaintiff ought to have surrendered himself; that is to say, he ought to have acknowledged the validity of a commission, which he has all along contested. That was not necessary. There is nothing in the Bankrupt Act which affects the jurisdiction of Courts of equity. When the Chancellor had jurisdiction, it might be convenient either to entertain the jurisdiction in bankruptcy, or direct a bill. But that does not apply at present. There is nothing which compels you to apply to the Court of Review in the first instance,

(a) 14 Ves. 580.

1835.
 TARLETON
 v.
 HORNEY.

and nothing which prevents the assignees from being parties to a bill. There are many cases in which Courts of equity have entertained bills by bankrupts before application has been made in the bankruptcy. In *Hitchcox v. Sedgwick* (a), the language of Lord Commissioner *Hutchins*, in reference to this point, is remarkable, as he speaks of a sale being set aside “*even upon petition*,” which shews that the jurisdiction by bill was then an ordinary jurisdiction. In *Bromley v. Goodere* (b), Lord *Hardwicke* observed, that bills are frequently brought in cases of bankruptcy for settling the demands of creditors. He does not say that bills cannot be brought except under the sanction of the Judge in bankruptcy; and it is clear that a direction given to file a bill does not give the Court a jurisdiction which it had not before. In *Cooke’s Bankrupt Laws*, Vol. 1, p. 2, it is laid down, that “though the Court can have no more power on a bill than on a petition, yet it is equally, if not more, proper that questions of importance should be brought before the Court by way of bill.” The cases which support this proposition are numerous: *Hawkins v. King* (c), *Lord Craven v. Widdows* (d), *Harding v. Marsh* (e), *Vanaker v. Nash* (f), *Treeces v. Townshend* (g), *Hankey v. Garrett* (h). And if this Court has jurisdiction, it is no objection to say that another Court also has jurisdiction. The jurisdiction in the Insolvent Debtor’s Court does not take away that of the Court of *Chancery*: *Barton v. Tattersall* (i). It is clear, both from the case of *Benfield v. Solomons* (j), and that of *Saxton v. Davis* (k), that Lord *Eldon* was of opinion that such a bill as the present would lie. In the

(a) 2 Vern. 156.

(b) 1 Atk. 76.

(c) Rep. Temp. Finch, 264.

(d) 2 Ch. Ca. 139.

(e) 2 Ch. Ca. 153.

(f) Rep. Temp. Finch, 60.

(g) 1 Bro. C. C. 384.

(h) 1 Ves. jun. 236.

(i) 1 Russ. & M. 237.

(j) 9 Ves. 77.

(k) 18 Ves. 72.

1845.

TARLETON
v.
HORNBY.

latter case there was not a sufficient averment of a surplus, though *Leach*, *arguendo*, says that there was; but, at all events, there was no averment that the debts had been paid. Lord *Eldon* adverted, not to the general jurisdiction, but to the jurisdiction in a case circumstanced as that was. A point similar to the present arose in the case of *Barton v. Jane* (a), decided in this Court. The testator, in that case, had been lessee of an inn. *Barton* was one of his residuary legatees. *Barton*, after the testator's death, was discharged under the Insolvent Act. The executors got a renewed lease of the inn, and the assignees, in consideration of a sum of money, confirmed the lease. *Barton* filed his bill against the executors, praying accounts, and that it might be declared that the executors were trustees of the lease for him. To this bill they pleaded *Barton's* insolvency. *Barton* then amended his bill, and made the assignees parties, and charged collusion between them and the executors, and the assignees demurred. The charges of collusion were not very strong; namely, that the debts amounted to 300*l.* or 400*l.* only, and that the share to which the plaintiff was entitled under the will was sufficient to pay the whole, and leave a surplus for the plaintiff; but that the defendants, the assignees, acting in collusion with the other defendants, declined to take proceedings for enforcing the amount and payment of the plaintiff's share. The demurrer was overruled, on the ground that it admitted that the assignees refused to take the steps required of them; that they colluded with the executors; and that there was a surplus. That case, therefore, is a clear authority to shew that a bill like the present is sustainable in any Court of equity. What is reported to have been said by Sir *John Leach* in *Kirkpatrick v. Dennett* (b), is absurd. A Court of equity, whether it be the Court of *Chancery* or the Court of *Ex-*

(a) Not reported.

(b) 1 S. & S. 411.

chequer, has a jurisdiction distinct from the Court of Bankruptcy. [The *Lord Chief Baron*.—The Chancellor, sitting in bankruptcy, sometimes feels a difficulty in deciding a question brought before him, unless there are more parties before the Court; therefore, by the same authority as he directs an issue at common law, he may direct a bill to be filed in the Court of *Chancery*. He might also direct a bill to be filed in the Court of *Exchequer*; only it would not inform him. He would direct it to come before him for satisfying his own conscience. That was the reason of bankruptcy not being administered here.] Then, on a bill filed like the present, is it or not imperative on a Court of equity to say you must go to the Court of Bankruptcy? Most clearly it is not imperative. It is said that bankruptcy is a *festinum remedium*, and that it is only under very special circumstances that a bill may be filed. But going into bankruptcy is a mere question of convenience; and it was so laid down by Lord *Lyndhurst*, when the present cause was argued on the question of the plea. While the commission is in operation, convenience requires that all the proceedings should be had under it; but, after those proceedings are at end, the reason for going in under the commission no longer exists. In *Saxton v. Davis* (a), Lord *Eldon* was clearly of that opinion, for he speaks of the commission in that case as being “now in full force.” Suppose, then, a case where every proceeding in the bankruptcy is concluded; the debts paid—interest paid—costs paid. Can the assignees then elect in what Court proceedings shall be had against them? In this case the jurisdiction in bankruptcy is completely discharged; every creditor is paid. The bill stops no proceedings in bankruptcy affecting the creditors; and the only parties between whom the proceedings could take place are the parties in this case. There is no allegation

1835.
 TARLETON
 v.
 HORNBY.

(a) 18 Ves. 79.

1835.

TARLETON
v.
HORNBY.

trustees, and that the Court can call on them, on the ground of their liability as trustees. There may be no difficulty in admitting this in certain cases, and it may also be admitted that, if there is no original jurisdiction, the leave of the Court cannot make a difference. Of course, if there is no original right, no permission will give it. But the proposition we contend for is this; that, from the moment of the bankruptcy, the jurisdiction under the commission is established. It was argued that, though public convenience required that no bill should be filed without previously shewing that injustice would be done without such a proceeding, yet that in many cases such a bill might be filed; and for this several authorities were cited. Those authorities were almost all old cases, occurring before the nature of the jurisdiction in bankruptcy was at all understood. *Vanaker v. Nash* (a) was a mere abstract of the pleadings; the assignees there mentioned were not assignees as now understood, but assignees under a deed of assignment; the bill was by a creditor praying to be let in under the commission; a bill which could not now be sustained. *Hawkins v. King* (b) was a bill to establish a set-off, but at that time the statutes of set-off did not exist. In *Lord Craven v. Widdows* (c), and *Harding v. Marsh* (d), the object was merely to effect an arrangement between two classes of creditors. The bill in *Harding v. Marsh* could not now be sustained. The decree in *Hitchcox v. Sedgewick* (e) is admitted on the other side to have been reversed in the House of Lords; and it is clear that a bill to redeem the mortgage, as in that case, could not be brought by creditors at the present day. From 1683 they proceed at once to a case before Lord *Hardwicke*, which contains a doctrine to which we accede.

(a) Rep. Temp. Finch, 60.

(d) 2 Ch. C. 153.

(b) Rep. Temp. Finch, 264.

(e) 2 Vern. 156.

(c) 2 Ch. C. 139.

In *Treves v. Townshend* (a) there were two assignees, one of whom died, and his executor got the money into his hands. A bill was filed, calling on the representative of the assignee and the surviving assignee to account. There is no jurisdiction in bankruptcy to make the representative of a deceased assignee account; the commission, therefore, could not reach the justice of the case, and, consequently, a bill was filed. *Hankey v. Garrett* (b) was a case of the same description, and pointedly illustrates the present case. The fund was mixed up of what could and what could not be administered in the bankruptcy. The bill was by creditors: the administratrix of the deceased partner, who was also his creditor by bond, was made a defendant. The Solicitor-General, *arguendo*, said, "The principle of bringing the bill admits that the fund was not to be distributed under the bankruptcy;" and the Lord Chancellor observed that the bill ought to have been on behalf of the creditors generally; not those only who had sought relief under the commission. This was, therefore, not a bill on behalf of the creditors who had proved. It is clear, therefore, *prima facie*, that what is administered in bankruptcy must be administered, not by bill, but by petition. But, supposing all these cases to be of authority, the present bill is filed by the bankrupt; not by the party who filed the bill in those cases. The right of creditors exists independently of the bankrupt statutes; but the bankrupt was treated originally as a criminal—all his property and all the benefit of his contracts concentrating in his assignees. The bankrupt's right is what is restored to him by a particular clause in the statutes of *Elizabeth* and *James*, which directs the commissioners to make payment of the overplus. That, therefore, is a particular remedy given to the bankrupt to get that which justice requires he shall get when the creditors are satisfied. This

1835.

TARLETON
v.
HORNEY.

(a) 1 Bro. C. C. 384.

(b) 1 Ves. jun. 23 .

1835.

TARLETON

v.

HORNEY.

Court has no jurisdiction to alter that rule. So long as justice remains in that channel, so long has this Court a security that the bankrupt shall do what is right; and this Court cannot vary or contradict what is done under the jurisdiction in bankruptcy. *Clarke v. Capron* (a). Then it is an inflexible rule that the bankrupt cannot be heard until he do justice by surrendering. Here there is not only no surrender, but the nonsurrender is put forward as a prominent fact in the case. On the ground of convenience only, that the party must do equity before he asks equity, your Lordship will say that it never was the intention of the legislature to give a right to the bankrupt to file such a bill as this.

With respect to the second point, as to the fraudulent sale, it has been argued, that if in an inferior Court an order has been obtained by fraud, this Court has jurisdiction to set aside the proceedings. There is no doubt about this: the Court has jurisdiction over all fraudulent contrivances, in whatever Court they may have arisen. But the question here is, whether the plaintiff has taken the proper course—whether his course ought not to have been in the bankruptcy. The sale was effected by an order in the bankruptcy, obtained, as is alleged, by a fraudulent contrivance. It does not appear by whom the petition for the sale was presented; but it is clear that, if done as stated, it was by *J. C. Tarleton's* collusion. Now if a party submit himself to any of the proceedings in bankruptcy, he submits to the whole. In *Ex parte Gould* (b), the petitioner was the mortgagee of the bankrupt's estate. That estate was sold under Lord *Loughborough's* order, and *Fry* was declared the purchaser. *Fry* not having completed his purchase, he was, upon the petition of the mortgagee, ordered to do so, although he

(a) 2 Ves. jun. 66.

(b) 1 Gl. & Jam. 231. See *Ex parte Lucas*, 1 Mont. & Ayr. 93.

did not appear upon the hearing of the petition. That case went much further than is contended for here, though not further than justice required. Besides, the bankrupt not only may, but must, proceed in the bankruptcy. The relief sought by annulling the sale is only ancillary to compelling payment of the surplus; and we contend that the surplus can only be obtained in the bankruptcy.

Another point appears to be conclusive. We appear for *Barnes* only. Nothing is asked against us, supposing we have got over the question of account. It must be admitted, that when three or four parties are implicated in a fraud, you make all co-defendants, though one only gets the fund. But the rule must be taken with the reservation, that you must pray costs against them. Here no relief is prayed against the defendant, arising out of the circumstance of his being *particeps criminis*.

If this were *res integra*, the case might rest here; but it is not so. Your Lordship is called upon to undo the deliberate solemn decision of Lord *Eldon*, in *Saxton v. Davis* (a). That case is as nearly as possible the same as the present. It has been doubted whether there was an allegation of a surplus in that case. At all events, there was no allegation from which it would appear that the debts were not all paid in full. Besides, has a bankrupt no interest in the surplus, even if the debts are not all paid? Has he no interest in shewing that he has paid 15s. in the pound? All the grounds of convenience are with the defendants in this case, and the demurrer must be allowed. [The *Lord Chief Baron*.—The observation of Lord *Eldon* in that case is certainly very striking—that he was apprehensive of making a precedent, an instance of which the bar could not furnish.]

With respect to the objection for want of parties, it has been said that the mortgage debt to the executor of

1835.

TARLETON
v.
HORNEY.

(a) 18 Ves. 72.

1835.

TARLETON
v.
HORNEY.

Backhouse was, in fact, a debt under the commission; and that there being an allegation that all the debts under the commission are paid, the executors are not necessary parties. Supposing, however, that they are paid, the estate has not been reconveyed, and the parties having the legal estate must be before the Court.

The LORD CHIEF BARON.—This question has been very ably argued on both sides. It is a question of importance, and I have considered it with some anxiety. When I first heard it, I own my impression was, from the combination charged between *Tarleton* the younger and the assignees, that there was sufficient ground to maintain this bill, at least against the demurrer; but I must say, that on very serious reflection, on hearing the arguments, and looking at the cases, I have come to a contrary conclusion.

It would be very satisfactory to me, if I could find any precise case to govern me on the subject. I should think it my duty at all times to treat such a case with the greatest respect, and in this particular instance to adhere to it. I asked if any case could be found where any bill had been permitted to be filed against assignees by an uncertificated bankrupt, to bring them to an account of his estate; and the bar has candidly answered that no such case can be found; and I am brought to that conclusion by Lord *Eldon's* judgment in the case of *Saxton v. Davis*. Upon examining that case I find that Lord *Eldon*, who had as much experience as any man who ever sat in a Court of equity, himself stated that the bar could furnish no such precedent; and, on looking at the matter on principle, I own it appears to me that nothing could be more dangerous, than to set an example of a case that might be acted on as a precedent for such a proceeding.

There is a bankrupt who does not, at present, by any

suggestion on his bill, place himself in a situation to dispute his bankruptcy. He has never surrendered to his commission; he is, in fact, by the statute not entitled to the protection of the law; and he seeks by a bill to call his assignees to an account of all their transactions, from the first origin of his bankruptcy up to the present moment. He does not ask for any decree or order touching the commission, but only prays for them to account, on the suggestion (which upon this case is supposed to be satisfactorily proved) that all the debts have been paid, and the object of the commission consequently satisfied. It is perfectly obvious, if that be so, that he has, as a matter of course, the easiest remedy in the world to supersede his commission, by appearing in the Court of *Chancery*. But the answer to that is, that he is a gentleman of a peculiar temper, and that he has made a vow that he will never surrender to his commission. That would be a very dangerous ground for a Judge in a Court of equity to act upon, and one which I apprehend would not apply to the case of other men. I must assume that he is governed by the ordinary prudence, and possessed of the same feelings that govern other individuals, and, therefore, he ought to go to the Lord Chancellor, and state by petition that he is ready to submit to his commission; that the debts are all paid; and that he desires a *supersedeas*. There is nothing, therefore, I deny him by allowing this demurrer, that he could not obtain by that proceeding, with much more effect, at much less cost, and by a much shorter course than is open to him by this bill.

But let us look at the grounds on which, as I conceive, such a proceeding cannot be taken against assignees. The first statute in bankruptcy, as we all agree, was in the time of *Hen. 8 (a)*. That gave to the Lord Chancellor and to the Privy Council power to dispose of bankrupts' estates. There is not a word about assignees,

(a) 34 & 35 Hen. 8, c. 4.

1835.

TARLETON
v.
HORNEY.

1835.
 TARLETON
 v.
 HORNEY.

nor is there any defined mode of proceeding to settle what the form should be. It was left very much at the discretion of the members of the Privy Council to make such orders as they should think fit.

Then comes the statute of *Eliz. (a)*, which gave power to the Lord Chancellor, if he thought fit, to name commissioners, that is to say, to exercise the authority the Privy Council had before exercised in a general way, by means of commissioners appointed by him, and accountable of course to him or the Privy Council for their transactions; and then comes a clause in the statute, that, if the bankrupt's estate should pay and satisfy all the demands against him, the commissioners should account to him, and pay him the surplus.

The next statute in point of order is the statute of *James*, which carries the obligation of the commissioners a step farther; for the bankrupt is entitled to demand of the commissioners an account of his estate, and to demand from them payment of the surplus of his estate; and also to proceed against those who withheld the estate; to recover it in his own person—in his own name—if the debts should all be paid. That might afford an answer to the argument drawn from the case before Sir *W. Grant*, who decided that, where all a bankrupt's debts were paid, and a portion of his real estate remained unappropriated for that purpose, it was not divested from him; and that, therefore, it would not, because the commission of bankruptcy intervened, go to his heir, and disappoint his devisee (*b*). Sir *William Grant*, in effect, says that, if his debts be all paid, the bankrupt is not absolutely divested, so as to be deprived of all interest whatsoever in his estate; that, in truth, he, by that very statute, has a right to recover the unappropriated part of his estate. But in the statute of *James (c)*, which authorizes the commissioners

(a) 13 Eliz. c. 7, sect. 2. (b) *Charman v. Charman*, 14 Ves. 580.

(c) 1 Jac. 1, c. 15, ss. 13, 15.

to assign (not to constitute assignees, as at present constituted) for the purpose of disposing of the estate more effectually, it is quite clear that the proceedings must be under the statute to call on the commissioners to account. I will not say whether the proceedings should be by bill in equity or not, because the statute says, that, on application to the commissioners, they shall account; and the Lord Chancellor may make an order on them, the commissioners, so to do.

The subsequent statutes in some degree modify the powers of assignees in bankruptcy, till we come to the time of *Geo. 1*, when the first statute was made, which was afterwards the foundation of the 5th *Geo. 2*. The 5th *Geo. 2* is the first which exactly defines the duties of assignees, and imposes obligations on them. Among those obligations is to be found this, that they are to make dividends by order of the commissioners once, twice, and as often as there may be occasion; they are also to account upon oath to the commissioners for their receipts and expenditure, and shew to them what they have in hand when the commissioners make a dividend (*a*). The commissioners, therefore, are the proper persons to ascertain, under any circumstances, the state of the bankrupt's estate: it is their duty, on application of the bankrupt, to call the assignees to account on oath for the administration of the bankrupt's estate. There is, therefore, no occasion to give the bankrupt any other remedy. That is the remedy given by statute, and it is not necessary for the furtherance of justice to entitle him to come to a Court of equity.

But I will not say that an extreme case may not be put where a bankrupt might come into a Court of equity. I do not wish to lay down any such principle; because the imagination can suggest a case where it would be very

1835.
TARLETON
v.
HORNBY.

(*a*) 5 *Geo. 2*, c. 30, s. 33.

1835.

TARLETON
v.
HORNEY.

hard indeed to deny him a remedy, and where no inconvenience could result ; and let me suppose this case :—A man is an officer in the army, and has a real estate, and while serving abroad, some creditors, together with some other persons, enter into a conspiracy to defraud him of his real estate, and they set him up falsely as a trader, and take out a commission of bankruptcy against him, and then obtain the ordinary means of disposing of his real estate. He returns to his own country, having heard nothing of this, and finds these proceedings. That would be a very proper case to apply to a Court of equity to set aside the fraud, and to compel these persons to give an account of what they had done. I only put that as an imaginary case, because I mean to protect myself from any conclusion that a case might not arise in which a Court of equity would have jurisdiction. I do not deny the jurisdiction. But consider what the consequences would be of allowing a bankrupt generally to call his assignees to account. If you once establish the principle that the thing may be done in a case where there is no complaint, and no attempt to set aside the commission, I should be glad to know why the ingredient of paying all the debts, and a surplus remaining over, is essential to the jurisdiction? It appears to me to make no difference at all; because the bankrupt would have a right, much short of that of discharging all his debts under the commission, to call on his assignees to account, in order to ascertain whether he had paid 15s. in the pound or not ; whether enough had been paid to entitle him to his allowance of 200*l.* or 300*l.* All these are interests which would entitle him to an account from his assignees. If you once, therefore, say that the bankrupt is entitled, from any interest that he has, to seek that account, he has that interest from the very beginning.

But supposing you were even, for the sake of argument, to admit the right of the bankrupt in the case where he has surrendered to his commission, what shall we say to a

Court of equity tolerating a bankrupt who never has surrendered to his commission at all ; who on the face of his own bill appears to have entered into very suspicious transactions, to have gone abroad, and to have made a merit of resisting his commission from first to last ; who says, that though he is by the statutes in effect an outlaw, because the first statutes declare that, if a bankrupt goes abroad and will not submit to a commission, he shall be out of the protection of the law, yet he shall come in a subsequent stage of this proceeding, and, under the suggestion that all the debts have been paid, demand of the assignees a full account ? If there were any occasion for him to do so for the purpose of obtaining relief, I admit that a Court of equity would be the proper place to resort to for that relief ; but as there is no occasion for it, and the precedent would lead to inconceivably ruinous consequences to assignees (and I do not see how any man would become an assignee under such a risk and peril), I conceive he has no right, under the circumstances of this case, to demand such an account—and undoubtedly no reason—because he may get it elsewhere ; and I cannot allow for a moment any argument to be raised on the mere reluctance which he has to submit to his commission. There is no disgrace in it. If a man complains that he is the victim of a fraud practised in his absence, which he could not control, by the infidelity and dishonesty of his own son, or any other person whom he has appointed his agent, there is no disgrace in his coming before the Lord Chancellor or before the Court of Bankruptcy, and saying, I have been injured by this fraud, and I now submit to you, for the purpose of superseding this commission.

But there is in this particular case another reason why the assignees should not be held liable. I cannot shut my eyes to the apparent object of this bill. This gentleman has tried by every expedient to dispute his commission. He has tried in various ways, and has been foiled in every

1835.

TARLETON
v.
HORNBY.

1835.

TARLETON
v.
HORNBY.

attempt. He first of all tried the question of the debt due from him to the executors; and he states in his bill that the verdict was found against him. Why was there not a new trial? He says, the reason why a new trial was not granted was, that the assignees made an objection that his son had no authority from him, and that his son was not his agent. He states that fact as a reason why the Court of *Chancery* would not grant a new trial. Then if that was so, and he is apprized of the fact, why did he not employ another agent, and send a power of attorney to a respectable person for the purpose of making that application? He gives no reason. Tracing him step by step, from the first period of his bankruptcy, from the first period of his dispute with the executors up to the moment of making this application, it appears that he has thrown every obstacle he could in the way of his assignees. Then he makes it a matter of fraud that they made a sort of compromise with the son, by which his son was put in possession of the real estate. It is not merely stating his inference that makes it the fact. It is not calling certain transactions by the name of fraud, that compels me to say the fraud is so clear as to overrule the demurrer. If the facts are of such a nature that no fraud can be inferred, it is not the mere imputation of it that will make it fraudulent. Now, running through this bill, which I have done with considerable care, I think you will find that observation applies to a considerable portion of the facts of this case, though perhaps that belongs more especially to the argument which relates to the son.

Under these circumstances, if ever there was a case in which a bankrupt had no right to force his assignees the last stage into a Court of equity, to give an account of all their transactions, this is the case. In the year 1831, he makes his last attempts against the assignees in an action of ejectment. There was then no case what of fraud or treachery. He does not allege on that

sion that he was deceived by any agent. He appears to have made then a case of a different nature ; and what was the consequence ? An order from the Court of *Chancery* restraining him from any proceedings whatsoever touching the validity of his commission. Then he comes here and desires an answer from the assignees, which answer, if they are bound to give, must necessarily bring before me the question of the propriety of issuing the commission ; so that indirectly he seeks to obtain by this bill what in his efforts in the Court of *Chancery* he could not obtain. It appears to me that I must take it to have been properly decided by the Lord Chancellor, that he should be restrained from taking any proceedings to dispute the commission. Under these circumstances, I think, therefore, as far as regards the assignee *Barnes*, who demurs, supposing the case stood only on the question of filing the bill against the assignees, the demurrer must be allowed.

The point on which I had the greatest difficulty was this—whether, independently of any question of account, the assignees might not still be made to answer ; whether the combination charged between *Tarleton* the younger, and the assignees, did not raise a question which I could not dispose of on demurrer. I own I hesitated very much about that ; but it appears to me that it was my duty to observe great caution that a man should not, by means of setting up a connexion between another party and his assignees, compel the assignees to do that which he could not otherwise compel them to do. I must say that I go along with the defendant's counsel in their argument that the relief prayed against *Tarleton* jun. does not require that the assignees should be made parties to the bill. I have looked at the bill with great anxiety, in order to see how the fact was. It is clear they had no interest at all—no personal interest—in giving him this estate for a less value than it was worth. But supposing

1835.
TARLETON
v.
HORNBY.

1835.

TARLETON
v.
HORNEY.

that what they did might amount to fraud and collusion, it is by no means a necessary part of his case to ask that relief against them; and there is no object in joining them, supposing the object is not to get a general account from them as assignees, except to make them pay the costs as co-conspirators. Now, if that were the only object, I should think it a very improper object, and that these were very improper means to introduce assignees as parties: because the whole mass of this bill relates to their transactions, and an account of them is asked; and with that particular part of it which relates to *Tarleton, jun.*, his treachery and conspiracy, they have nothing to do. He may take measures against his son, and compel him to give him some redress for his treachery, without touching the assignees. Well, then, the relief prayed against the son is, that he may hold the estates for him as trustee. If the son has no case to show for himself on that subject, of course the plaintiff will be allowed the relief he asks against the son; but I do not see how the assignees are necessary parties on that account.

I hope I am right in this decision. My anxiety has been not to furnish a precedent so fatal to the interests of all persons who are engaged in bankrupt's estates, as that assignees may, by indirect means, be defendants in a bill for a general account of all their transactions at the suit of an uncertificated bankrupt. Upon the ground, therefore, that a bankrupt uncertificated cannot be allowed in this particular case, or any case like it, to call on his assignees for a general account of all their transactions, which he might have by applying to the Court of Bankruptcy; and on the ground that the relief sought against the other defendant does not in the least, of necessity, or in any respect of convenience, require the assignees to be joined in this suit, I must allow this demurrer.

1835.

Jan. 23, 24, 29,
Feb. 10.

DEARE v. The ATTORNEY-GENERAL.

THE plaintiff's father, and afterwards the plaintiff himself and his father, as partners, were, many years previously to 1797, agents to his Majesty's regiments or troops, called the *Dunbarton* Fencible Cavalry, and the *Lanark* Fencible Cavalry; and in such character received various large sums of money from the government for the pay of those troops.

In the year 1824 an information was filed by the Attorney-General against the plaintiff, under the provisions of the 45 *Geo. 3*, c. 58, charging that parts of such sums of money, to a considerable amount, had not been paid or accounted for by the plaintiff or his father to the officers of the above-mentioned troops, and that the plaintiff was a debtor to his Majesty for the balance due in respect thereof; that no settlement had ever been come to between the plaintiff and his father, and the persons duly authorized in that behalf by his Majesty, and that the plaintiff had in his custody divers books of account, papers, writings, and documents, relative to the said agencies, by which it would appear what sums of money had been so received, and what remained unaccounted for, &c., and praying for a full discovery of the matters aforesaid, to enable his Majesty to sue for and recover the several sums of money and balances remaining in the plaintiff's hands, as the surviving partner and personal representative of his late father.

To this information the plaintiff pleaded in bar, that

that the clearing warrants had been invariably treated as a settled account, but that he had only recently, and since the plea, been acquainted with the proceedings at the War Office, by which the clearing warrants were rendered conclusive. The bill then charging that the defendants had divers papers, &c., by which the truth of the several matters alleged would appear, prayed for a discovery—for a declaration that the clearing warrants amounted to a settled account, and for a perpetual quietus from all proceedings by the defendants. To this bill the defendants having demurred, on the ground that they were public officers, and also for want of equity, the demurrer was overruled.

A demurrer to the relief will not extend to the discovery sought by the bill, although the specific relief prayed may be improper, if the bill states a clear case for equitable relief to which the discovery sought may be ancillary, and likewise concludes with a prayer for general relief.

An information having been filed by the Attorney-General against *A.*, for an account of his dealings and transactions with the government as an army agent, *A.* pleaded in bar of the information a settled account, by means of certain clearing warrants. This plea having been overruled, *A.* filed his cross bill against the Attorney-General and the Secretary at War, alleging

1835.

DEARE
v.
ATT.-GEN.

all the said accounts were finally settled by virtue of certain clearing warrants, which were made out and signed by the Secretary at War, and countersigned by the Lords of the Treasury for the time being, and issued by the proper authorities to the plaintiff. But this plea was overruled.

The plaintiff then filed the present bill, which was in the nature of a cross bill to the information against the Attorney-General and Mr. *Ellice*, then Secretary at War, stating the usage of the War Office as to the issuing of clearing warrants, which, as he alleged, depended on a strict investigation of the accounts, testified by vouchers, &c., delivered to the War Office; stating also nine different accounts which had been settled between the plaintiff's father and himself and the government, on the footing of this usage; and insisting, that previous to the year 1811, a clearing warrant had always been considered by all Secretaries at War, and other government officers employed on military accounts, army agents, colonels of regiments, and all other persons, as a complete quietus to the agent; and that no other settlement was ever asked for or considered to be necessary.

The bill then alleged, that though the plaintiff always knew that a clearing warrant, after the same had been adjusted and fully carried into execution, was, with reference to all transactions of a date prior to 1811, a final and settled account, and invariably treated as such; yet the plaintiff did not until very recently become acquainted with the whole of the proceedings at the War Office, Pay Office, and elsewhere, whereby such clearing warrant, when fully carried into execution, became a full and settled account for the regiments and corps, and for the period and service to which the same referred; and not till long after it was in the power of the plaintiff in any manner effectually to avail himself of his knowledge of such proceedings in his defence to the information afore-

said. That the Right Honourable *Edward Ellice* is now his Majesty's Secretary at War, and as such Secretary at War hath in his custody or power the whole of the general states or accounts, vouchers or writings, so delivered into the War Office by the plaintiff, or by the plaintiff and his father as aforesaid; and also the several clearing and other warrants and papers and writings relating thereto respectively, by which, and by other books and documents now or lately in the custody or power of the said Secretary at War, when produced, the truth of the several matters aforesaid would appear; and which the said defendants ought to produce, but which they refuse to produce. That the plaintiff cannot safely proceed in his defence to the said information of his Majesty's Attorney-General without such production, and a discovery of the whole of the matters and things connected therewith herein respectively set forth and inquired after.

The bill prayed that the defendants may set forth a proper list or schedule of all such accounts, &c., delivered by the plaintiff and his late father, or either of them, into the War Office as such agents, from *May*, 1794, to *December*, 1797. And also a list or schedule of all such clearing and other warrants, books or book accounts, memorandums and writings, which now are, or ever were, in the custody, possession, or power of the defendants, or of the Secretary at War for the time being, relating to the accounts of the said two regiments and corps, and for the period aforesaid, and otherwise relating to any of the matters aforesaid; and also a list of all writings and papers which were prepared at the War Office or elsewhere, under the power or control of the Secretary at War for the time being, or other officer of the government, relating to the matters aforesaid, or some and which of them, distinguishing which of the same are now in the possession, custody, or power of the said defendants, or either of them, and may leave the same in the hands of their clerk in court

1835.

DEARE
v.
ATT.-GEN.

1935.

DEARE
v.
ATT.-GEN.

for the usual purposes, and may set forth what hath become of such of them as are not now in the possession, custody, or power of the said defendants or either of them. And that the said defendants may respectively make a full and true disclosure and discovery of the several matters and things hereinbefore stated and charged. And that it may be declared by this Court that the said clearing warrants for the service and period to which the same extend, after having been carried into execution in manner herein mentioned, amount to such full and final settled account as herein is mentioned; and that neither the same accounts, nor any of them, ought now to be disturbed or opened. And, in order that the plaintiff may be for ever quieted respecting the said agency accounts, for the period and service herein mentioned, that Sir *John Campbell*, his Majesty's Attorney-General, and the said Secretary at War, and their successors respectively, may be perpetually enjoined, by the order and injunction of this Court, from prosecuting the said information, or from instituting or prosecuting, or causing to be instituted, any other legal proceedings in this Court or otherwise, against the plaintiff, touching the same; and for general relief.

To this bill the defendants put in their joint and several demurrer, assigning for cause, that it appears by the said bill that these defendants, and each of them, are sued as public officers of his Majesty's government, acting for and on behalf of his Majesty; and of and concerning matters and transactions arising out of and within their duty and employment as such public officers, and not in any manner in their or either of their private character as individuals; submitting, that this Court ought not to entertain jurisdiction of all or any of the matters in the said bill mentioned against these defendants or either of them: and assigning for further cause, that the said complainant has not by his said bill shewn any matter of equity against these defendants or either of them, or made such a case

as entitles him in a Court of equity to the relief or discovery thereby sought against them, or any relief or discovery whatever as to the matters contained in the said bill, or any of such matters.

1835.

DEARE

v.

ATT.-GEN.

Mr. *Rolfe* and Mr. *Wray*, for the demurrer.—If this bill were filed against private individuals, no doubt a demurrer would hold. The plaintiff might be entitled to the discovery, but he would not be entitled to the relief; and therefore failing as to the relief, he would fail as to the discovery also. Here the plaintiff seeks both discovery and relief. He prays the discovery of the clearing warrants; and that, when discovered, they may be declared to amount to a settled account. That is in effect asking the Court to declare the documents in question to be a good defence to the plaintiff in any suit or action which may be brought against him, without trying the merits of such a suit or action. Such a bill is totally inadmissible. In *Enfield v. Jolliffe* (a), it appeared that *Jolliffe* and *Banks* were contractors for building *London* bridge. They employed *Henfray* as their surveyor, and he was to be paid by receiving a portion of the profits. *Henfray* died, and upon his death a question arose whether he was to receive one-eighth of the entire profits, or only one-eighth of the profits during the time he superintended the concern. His representatives, conceiving that he was entitled to one-eighth of the whole profits, filed their bill against *Jolliffe* and *Banks* for an account and payment accordingly. *Jolliffe* and *Banks*, having reason to believe that certain transactions between them and *Henfray* amounted to a settled account, filed a cross bill against the executors of *Henfray* for a discovery of their transactions, and that they might be declared to amount to a settled account. To this bill the executors filed a general demurrer, which

(a) Not reported.

1835.

DEARE
v.
ATT.-GEN.

was allowed by Lord *Lyndhurst*. In that case the counsel who supported the cross bill cited the *dictum* of Lord *Redesdale*, that a demurrer to a cross bill will not hold (a); but it was answered, that the meaning of that *dictum* was only this—that a demurrer would not lie for want of jurisdiction in the Court; not that the defendant to the cross bill might not demur in respect of the relief sought by such bill. That case, therefore, is decisive of the present as regards the relief. Here the discovery sought is likewise improper. It is clear that you cannot file a bill against public officers for the discovery of papers affecting the public service.

Mr. *Simpkinson* and Mr. *Miller*, for the bill.—The bill is not filed in this Court as a Court of equity merely, but as a Court of revenue, a Court indirectly concerned in taking and settling the public accounts. In the *Attorney-General v. Deare*, the House of Lords decided that clearing warrants did not amount to a settlement of accounts. There is no doubt of that. But we contend on the present occasion, that the warrants, coupled with other circumstances, amount to such a settlement. The bill alleges that some important fresh information was not obtained till after the filing of the answer to the information. It also appears from the bill, that the accounts between the army agent and the War Office and *Deare* were settled. The bill alleges that no error exists therein, and that no sum is due to the public by reason of such accounts. It is admitted, therefore, by the demurrer, that there is no error in that respect; nevertheless, an information under the 45 *Geo. 3* has been filed against the plaintiff, calling on him to deliver up his books to the War Office, upon a mere allegation that the accounts have not been settled. The Court has jurisdiction to control the acts of all per-

(a) Mitf. 203.

1835.
 DEARE
 v.
 ATT.-GEN.

sons, either concerned in collecting the revenues or in auditing the accounts of persons amenable to the Crown. In *Ex parte Durrand* (a), *Macdonald*, C. B., assumed that the Court had jurisdiction; and the only question was, whether it should be exercised by petition or bill. *Laragoity v. Attorney-General* (b), *Crawford v. Attorney-General* (c), and the luminous judgment of *Graham*, B., in *Ex parte Colebrooke* (d), are authorities on this subject; and they entirely remove the objection urged against us, that though we might be entitled to the discovery, we are not entitled to the relief sought for by this bill.

But then it is said that the defendants are sued in their official characters, and that the Court has no jurisdiction in that case. But, in all the cases cited, the Attorney-General was sued in his official character. Even the Court of *Chancery* has entertained suits against persons in their official character. In *Rankin v. Huskisson* (e), one point which was urged was, that the Court had no jurisdiction against the Commissioners of Woods and Forests; but the Vice-Chancellor granted the injunction. In a similar case of *Codrington v. Lord Lowther* (f), the bill was filed against the Commissioners of Woods and Forests; and the Attorney-General, and the object of the bill was to restrain proceedings at law by the Attorney-General. To this bill the commissioners, although public officers, put in a full answer, and inserted in a schedule all the papers inquired after. This cause was afterwards compromised; but it serves to disprove the proposition that papers, the moment they get into the hands of a public officer, are not to be delivered up. In *Attorney-General v. Brooksbank* (g) the defendant's plea having been overruled, he moved to amend his plea; and, for that purpose, that the Attorney-

(a) 3 Anstr. 743.

(b) 2 Price, 172.

(c) 7 Price, 1.

(d) 7 Price, 87.

(e) 4 Sim. 13.

(f) Not reported.

(g) 1 Y. & J. 439.

1835.

DEARE
v.
ATT.-GEN.

General might be directed to produce and leave certain documents in the hands of one of the clerks in Court. The application was granted; the Court only doubting whether the defendant should not have filed a cross bill. That case seems to be decisive of the present.

Lastly, notwithstanding the case before Lord *Lyndhurst*, no demurrer lies to a cross bill. *Mitford, Eq. Pl.* 203; *Coop. Eq. Pl.* 215; *Wy. Prac. Reg.* 85.

Mr. *Rolfe*, in reply.—Let it be assumed, for the sake of argument, that there is nothing in the character of the Attorney-General to prevent him from making a full discovery. The bill prays for a declaration that the clearing warrants amount to a full and final settled account, and for a perpetual injunction to restrain the defendants from proceeding against the plaintiff. The records do not afford an approach to a precedent of such a bill. The case of *Codrington v. Lord Lowther*, cited on the other side, confirms this observation. The Commissioners of Woods and Forests, having a very extensive power of granting leases, had some communication upon the subject of a lease with Sir *Bethell Codrington*. A dispute arose as to how far they had entered into a contract to grant him a lease; and, in order to bring the matter to a test, they filed an information of intrusion against him. Sir *Bethell Codrington* took to his counter remedy, and filed a bill in equity against them, not for discovery, but for ordinary relief—for a specific performance of the contract to grant a lease; that the agreement so made might be declared binding on the new commissioners, and carried into execution; that the defendants might execute a proper lease to the plaintiff, the plaintiff being willing to execute a counterpart; and that the defendants might be restrained from commencing or prosecuting any proceedings at law to recover possession. That injunction was ancillary to granting the relief. Upon filing such a bill the party was

entitled, as of course, to an injunction till the hearing. What is here asked is not only the benefit of discovery, but a declaration that the matter so discovered may afford a defence in this or some other Court. The case before Lord *Lyndhurst* decides the present question.

1835.

DEARE
v.
ATT.-GEN.

The LORD CHIEF BARON.—The demurrer being to the whole bill, if there be no ground for relief stated in the bill, and improper relief is prayed, the demurrer will be good as to the discovery as well as to the relief; because, in such case, the discovery would be absurd. Granted: but, if there is sufficient ground in the bill for some relief, surely I am not bound by the specific prayer of the bill; but, under the prayer for general relief, may give the plaintiff the proper relief. The general prayer gives the Court jurisdiction. I must take for granted all the facts stated in the bill to be true, namely, that these documents amount to a defence—that they are in the possession of Mr. *Ellice*—and that the plaintiff has discovered them since the period when he could have used them as a defence to the information.

Jan. 29th.

Mr. *Rolfe* suggested that there was no necessity for the plaintiff proceeding by cross bill. If, since his former answer, he had discovered new matter for his defence, he might have filed a supplemental answer in the nature of a plea *puis darrein continuance*. He might, in any term, after filing his former answer, have asked for leave to file such a supplemental answer.

The LORD CHIEF BARON.—That might not help him. If he filed a supplemental answer, he might also file a cross bill in aid of the supplemental answer.

Mr. *Simpkinson* referred to *Hoare v. Parker* (a).

(a) 1 Cox, 224.

1835.

DEARE

v.

ATT.-GEN.

Feb. 10th.

The LORD CHIEF BARON.—The facts that are admitted by the demurrer are these—that certain documents exist in the possession of one of the defendants, which, if produced, would amount to a clear defence and exoneration of the plaintiff as against the information which has been filed against him, and that they have not been discovered by him until after the period when it became too late to urge them in his defence. These are the facts stated upon the bill, and the demurrer admits those facts. The plaintiff then goes on to pray not only a discovery, but for what has been argued to be impossible to grant, namely, a general and perpetual acquittance, so as to bar the Attorney-General for ever from proceeding against him. Now, undoubtedly, it may be true that the specific relief, which forms part of the prayer of the bill, he may not be able to obtain. But then it is argued, that, where a party asks for a discovery, but unites that discovery with a prayer for relief, which it is impossible for him to obtain, then, according to decided cases, and according to principle, the bill ought to be dismissed; inasmuch as it shews that the object of discovery is one which could be of no avail—which he cannot make use of or rely upon in a Court of equity. I am very well aware that it has been decided in a series of cases since the time of Lord *Thurlow*, that a general demurrer may be put in to a bill of that nature; that there is no occasion to demur both to the inquiry and to the relief, but that a general demurrer will answer the purpose of disposing of the bill. I concede that; but it appears to me that this must be taken with the qualification that there is no matter of equity disclosed in the bill itself, which shews the party entitled to some species of relief; because if any such matter be disclosed, then, although the specific prayer may not be consistent with that, or may ask something beyond what is attainable in a Court of equity, yet the general prayer of the bill may be brought in aid, and he is entitled, under that general

prayer, to such relief as the nature of the case will justify. But then it was argued for the defendant, and I was very much struck at first by the argument, that what the plaintiff has stated here he might have urged in his defence—that he might have done it in the shape of an amended answer. Now, though that may be true, still it appears to me that I am asked to assume that what the plaintiff has stated in his bill is false: how, then, is that consistent with the general rule that all the statements in the bill are admitted by the demurrer to be true? I am bound to presume, that the plaintiff is placed in such a position by the proceedings that have taken place in this Court, but which are not detailed in the bill, that he could not sufficiently avail himself of the defence which he seeks to make by this discovery, if he attempted it in any other way than by bringing it before the Court by a cross bill. A cross bill is very often filed for the purpose of bringing matters before the Court which the defendant cannot so conveniently set forth in his answer. He may require a discovery, in order to assist him in bringing those matters sufficiently before the Court. Surely, then, it is a sufficient ground for that discovery, if, upon the face of his bill, he discloses such matter as, if true, would amount to a clear defence on the information, but which from circumstances he could not use in the defence which he has already made. It is very true that this Court cannot pronounce any decree that shall exonerate him, under all circumstances and at all times, from any claim of the Crown; because any suggestion of fraud, though the decree was actually made, would of course entitle the Crown to proceed *de novo* against him, and to bring forward that new matter. But, assuming the facts to be true, as stated in this bill, I cannot hesitate to say that they amount to a clear defence to the particular suit instituted by the Attorney-General against him; and, if that be so, surely he is entitled to this sort of relief, namely, that he may have the

1835.

DEARE
v.
ATT.-GEN.

1835.

DEARE
v.
ATT.-GEN.

benefit of the discovery for the purpose of adducing those facts before the Court in a specific and distinct form, when both the bills come on together.

A great deal of learning has been gone into for the purpose of shewing that such a bill may be filed against the Attorney-General. I make some remarks upon it, that I may not be supposed to have overlooked any part of the argument. I apprehend that the Crown always appears by the Attorney-General in a Court of justice, especially in a Court of equity, where the interest of the Crown is concerned. Therefore, a practice has arisen of filing a bill against the Attorney-General, or of making him a party to a bill, where the interest of the Crown is concerned. I am not prepared to say that a bill of discovery has ever been filed, or could upon principle be sustained against the Attorney-General for a discovery of matters that can be neither in his personal nor official knowledge; or that the Crown would be bound, through the medium of the Attorney-General, to make that discovery. At the same time it has been the practice, which I hope never will be discontinued, for the officers of the Crown to throw no difficulty in the way of any proceeding for the purpose of bringing matters before a Court of justice, where any real point of difficulty that requires judicial decision has occurred. Hence there are a great variety of cases where bills of this sort have been filed, in which the Attorney-General has been a party; and one case has been referred to, where it appears that the Attorney-General did set forth a full answer (a). There the Treasury desired that the question might be brought before the judicial consideration of some Court of justice; and it was very clear, when once the Court thought that it ought to have jurisdiction over the subject-matter, that it did not become the Attorney-General to urge any form in opposition to

(a) *Crawford v. Attorney-General*, 7 Price, 1.

it: otherwise, I think it would be a difficult thing to say that a mere bill of discovery might be filed against the Attorney-General, instead of putting the party to his petition of right, which is the proper remedy against the Crown, where he claims a specific relief against the Crown.

But that case of *Crawford v. The Attorney-General*, as well as *Ex parte Colebrooke*, appear to me to have no distinct relation, except for that point, to the present case. Those were cases only in which the Court of *Exchequer* thought, upon argument, (at first not the majority of the Court, but only Mr. Baron *Graham*, though afterwards, upon the production of many authorities, all the Court), that this Court had, by virtue of its original constitution, a jurisdiction over public auditors appointed for the purpose of auditing public accounts, unless that jurisdiction was expressly taken away by statute. Now, as it appears by the statute appointing the auditors of public accounts, that there was no express denial of the jurisdiction of the Court, but, on the contrary, a recognition of it in one or two cases, the Court resolved, and I think justly, that they had the same jurisdiction on behalf and for the benefit of the subject over the auditors of public accounts, when the case was properly brought before them, as they would have had over the auditors of the imprest, or auditors appointed by the Court of *Exchequer* for the purpose of auditing public accounts. I do not, however, think the consequence that was in argument deduced from that position, was justly deduced from it, namely, that therefore a bill might be filed against the Attorney-General on such a subject. On the contrary, if they were to be considered in effect officers of the Court, it should rather appear that matters complained of might be brought before the Court on motion. I believe it would be a new proceeding to file a bill against any of the officers of this Court, to whom a matter of account was referred, in order to make him a party to a discovery, or to

1835.

DEARE
v.
ATT.-GEN.

1835.

DEARE
v.
ATT.-GEN.

afford any relief to a party who seeks relief. Those cases, however, certainly shew that the Attorney-General may be made a party to such a bill. I never doubted that position; it has been so long established, that there was no occasion to go into a great deal of learning for the purpose of supporting that proposition.

We come back, therefore, to the short ground on which I decide this case; that there does appear to me to be on the face of this bill a ground of relief on which the party is entitled, which he alleges he could not obtain by the pleadings in the original cause, and therefore he asks for a discovery. What the effect may be of an answer I do not pretend to say; but, in case of any doubt whether a demurrer can be sustained or not, the safest course is to overrule the demurrer; because the party will have the same benefit upon the answer that he could have had upon the bill and the demurrer. Therefore, however much shaken I have been—which I confess I was—by the argument for the defendants; nevertheless I come back to the original impression which I had formed in the outset, that there was sufficient in this case to call upon me to overrule the demurrer. I am the more inclined to act upon that opinion, though I do not pretend to entertain a very great confidence in it, from the conviction that it will be no prejudice to the parties if I adopt that course; whereas it might be very much otherwise if I were to allow the demurrer. Upon these grounds, therefore, I think it right to overrule the demurrer.

1835.

BELLWOOD *v.* WETHERELL.Jan. 15th, 28th,
March 2nd.

THE defendant in this suit, as lay impropriator of the rectory of *Osmotherley*, in the county of *York*, in *Trinity* Term, 1838, filed his bill against the present plaintiffs and others, for an account of tithes for lands in their respective occupations within the said parish.

The present was a cross bill filed for the purpose of obtaining a discovery of the defendant's title. It alleged that the defendant was only a portionist of some tithes arising upon certain lands within the parish of *Osmotherley*, and not the impropriate rector of such parish. It likewise alleged that the first conveyance under which the defendant claimed title, and which the bill charged to be in his possession, and which bore date, &c., did not contain certain lands for which he claimed tithes, although in subsequent conveyances, which were likewise in his possession, those lands had been preserved with a view to give the persons claiming under the same an apparent or valuable title to the said rectory.

The defendant in a tithe suit, who denies the rector's title, cannot, by a cross bill, compel the rector to discover the evidence of his title; therefore, where the rector, by his answer to such a cross bill, refused to set forth under what deed or deeds the rectory was conveyed to the persons under whom he claimed, exceptions to the answer, which had been taken on the ground of that refusal, were overruled.

The bill contained charges, on which the following inquiry was founded:—"Whether the said *Benjamin John Wetherell* is in any and what manner, or under any and what deeds or deed, entitled to the tithes which he is seeking to recover by his said bill against the plaintiffs. And that the said *Benjamin John Wetherell* may discover and set forth what tithes within the said parish of *Osmotherley* he is seised of or entitled to, and how and in what manner and in what capacity he is seised of or entitled to the same, and under what deeds or deed, and the dates or date of such deeds or deed, particularly the dates or date of the first deeds or deed, under which he alleges the said rectory was conveyed to the person or persons under whom he claims such rectory."

The defendant by his answer denied that he was only a

1835.
 {
 BELLWOOD
 v.
 WETHERELL.

portionist. He said that one *John Weighill* had formerly the said rectory duly conveyed to him, or by other good and lawful means became the lay impropriator thereof. That he, the defendant, claimed to be entitled to all the tithes, both great and small, within the township of *Osmotherley*, excepting from such lands the tithes whereof had been sold off, but which lands were not in the occupation of any of the plaintiffs. That he, the defendant, was the impropriate rector of the said parish, and that he derived title to the tithes aforesaid under the said *John Weighill*. With respect to the foregoing inquiry, his answer was as follows:—"That he is in manner hereinbefore, and in his said former answer mentioned, entitled to the tithes which he is seeking to recover by his said bills. And he insists and submits that said plaintiffs are not entitled to be informed under what deeds or deed, or the dates or date of such deeds or deed, particularly the dates or date of the first deeds or deed under which he alleges the said rectory was conveyed to the person or persons under whom this defendant claims the said rectory."

The plaintiff took exceptions to the answer for insufficiency.

Mr. *Barber* and Mr. *Bayley*, for the exceptions.—This is a cross bill filed for the discovery of deeds, in order to prove the allegation that the plaintiff in the original suit is only a portionist. A similar course was taken in *Bowman v. Lygon* (a), where the demurrer to the cross bill was overruled. *Metcalf v. Harvey* (b), and *Moodalay v. The East India Company* (c), are authorities in favour of the plaintiff. The former of these cases is very strong. There Lord *Hardwicke* laid it down, that a person in possession of an estate might file a bill to discover the

(a) 1 Anstr. 1. (b) 1 Ves. sen. 249. (c) 1 Bro. C. C. 468.

title of a person bringing ejectment against him. No doubt the general rule is, that where a man as plaintiff files an original bill to establish his title, he may call for deeds which shew his own title, but not those which would discover the title of the defendant. That position is not disputed. But where a man is defendant, the case is different. If a person is brought into a Court of equity, he has a right to call on the person who brings him there to discover his title, because it is by way of defence. You may, by a bill of discovery, make a plaintiff a witness against himself. In aid of a defence, a discovery will be enforced, even though the party compelled to make it may be made liable to penalties in consequence: *Bishop of London v. Fytche* (a), *Macauley v. Shackell* (b). It is the constant practice of underwriters, when sued on a policy which they believe to be affected with fraud, to file a bill for discovery against the plaintiffs at law, although the discovery might subject the parties to an indictment or penalties.

1835.
BELLWOOD
v.
WETHERELL.

Mr. *G. Richards*, *contrà*.—The plaintiff is not entitled to the production of these deeds, and the principle is the same either on a cross bill or an original bill. Where the defendant admits that he has deeds which make out the plaintiff's title, the Court will order them to be produced. But the Court will not order their production in this case, for the defendant has admitted deeds which relate to the rector's title only. In *Bowman v. Lygon* (c), the demurrer was overruled; because, as *Thompson*, B., observed, it covered too much. In the same case, *Eyre*, B., said, that the rule as laid down by Lord *Hardwicke* went much too far: but that in the case before him, the demurrer was overruled on other grounds. It is impossible to deny that

(a) 1 Bro. C. C. 96. (b) 1 Bligh, N. S. 96. (c) 1 Anstr. 1.

1835.

BELLWOOD
v.
WETHERELL.

Lord *Hardwicke's* is a dangerous decision. In the case of underwriters, the admission of fraud on the part of the defendant makes out the case of the plaintiff. [The *Lord Chief Baron*.—The defendant puts your title in issue. Suppose that, upon the hearing, you, having shewn no previous title in answer to the bill should succeed, you would be entitled to a decree; but that would be no answer to the real rector who afterwards filed his bill. You say that defendants who are underwriters may file a bill of discovery, whatever be the consequence to the plaintiff. Does not that apply here? Is it not essential that the defendants should know whether the plaintiff is really rector, in order to be guarded against a suit by another person?] In *Glegg v. Legh* (a), the same point was agitated as in the present case, and the discovery was refused. *Parker v. Legh* (b) was a decision to the same effect. *Sampson v. Swettenham* (c), *Collins v. Gresly* (d), *Bligh v. Berson* (e).

Mr. *Barber*, in reply.—Except the case in *Maddock*, the cases cited have no application. The parties were plaintiffs, and filed their bills for the recovery of tithes. But here you bring the defendant into equity against his will. He then referred to *Mitford on Pleading*, 53, 54.

Mr. *Simpkinson*, *amicus curiæ*, said, that since *Glegg v. Legh* was decided, Sir *John Leach* had in a similar case decided otherwise, and had overruled the demurrer.

Jan. 28th.

On a subsequent day, Mr. *Simpkinson* said, that his remark on a former occasion was corroborated by the decisions in *Glegg v. Legh* (f), and *Cherry v. Legh* (g), in

(a) 4 Madd. 193.

(b) 4 Madd. 207.

(c) 5 Madd. 16.

(d) 2 Y. & J. 490.

(e) 7 Price, 205.

(f) 1 Bligh, N. S. 302.

(g) Id. 306.

the House of Lords, in which cases answers were put in. He also referred to *Attorney-General v. Davison* (a).

1835.

BELLWOOD

v.

WETHERELL.

Mr. *G. Richards*, for the defendant, referred to *Bolton v. Corporation of Liverpool* (b).

THE LORD CHIEF BARON.—These are exceptions to the answer to a cross bill filed against a lay rector, the rector having filed his original bill for an account of tithes. The defendant in the original suit puts the plaintiff's title in issue in his answer, and then files his cross bill against the plaintiff for a discovery of his title, disputing his title as rector, alleging that he is only a portionist, and not the rector generally; he does not, however, suggest that any body else is rector, or that any body else is entitled. These exceptions are taken to the answer, because the rector does not set forth his title in manner required by the bill. The question, therefore, is this, whether the rector under the circumstances is bound to disclose the evidence of his title? Upon looking at the cases, some of them appear extremely embarrassed and contradictory, and no steady principle is adopted in them. The case which appears at first to be most in point, is that of *Bowman v. Lygon* (c), but it does not furnish a precise decision on the subject. That was a bill filed by a rector for tithes; the rector's title was put in issue, and a cross bill was filed, seeking a discovery of the rector's title, and whether he had received any agistment tithe. The demurrer was to both these points. The principle was there recognised, that, as a general proposition, a man should not be obliged to discover his title; but the same distinction was attempted to be established in that case as in the present; one of the counsel arguing, that where a person

March 2nd.

(a) 1 M'Clel. & Y. 160.

(b) 3 Sim. 467; 1 Myl. & K. 88.

(c) 1 Anstr. 1.

1835.

BELLWOOD
v.
WETHERELL.

is defendant to an original bill, he is entitled in all cases to a discovery of the plaintiff's title. I cannot accede to that. The judgment in that case was no doubt correct, because the demurrer covered too much. Mr. Baron *Thompson*, a most consummate Judge both in law and in equity, proceeded with his usual caution on that occasion, and avoided coming to any decision on a point not in question. He held the demurrer bad, for the reason I have stated, but gave no opinion upon the other point; a reserve which would have been wholly unnecessary, if he had thought it perfectly clear and indisputable. Then Lord Chief Baron *Eyre*, a person of great accuracy, though not always so cautious in delivering his opinions as Mr. Baron *Thompson*, throws out an observation which qualifies the general proposition. He seems to consider that nothing but some pressing matter arising in the particular suit would justify the discovery. He says it is difficult to draw a line in what cases discovery ought to be granted, as where the tenant is fearful of being harassed by different claimants of the impropriation. Now the obvious line to be drawn is this—that though in general the defendant has no right to a discovery of the plaintiff's title, yet in certain cases he will be entitled to a discovery of the nature, though not of the evidence, of that title. Thus, where a party files a bill as rector, the defendant may file a cross bill, to see whether the plaintiff in the original suit is entitled to have that which he admits may be due to somebody. The defendant may allege that some other person is entitled, and in such case he may file his bill of interpleader. If he does not go that length, he may suggest that he has had notice that some other person is entitled paramount to the plaintiff, or that the plaintiff has parted with his right to the tithes; and in such case, though there is no ground whatever to make the party disclose the evidence of his title, still there is ground to call on the party to discover the nature of his title, so that the defen-

dant shall not be harassed a second time. That would apply to several cases: as, for instance, if the defendant to an original suit had established a *modus*, and it then turned out that the plaintiff had parted with his interest, a person claiming by a paramount title might say that he was not bound by that decision. It is clear that in such case the defendant would have a claim to discovery of the nature of the plaintiff's title, in order to protect himself in that particular payment.

The distinction to be taken in cases of this nature was recognised in those cases of *Glegg v. Legh (a)*, and *Cherry v. Legh (b)*, in the House of Lords. In the former case, the plaintiff filed his bill as rector for the recovery of tithes. The answer denied the plaintiff's title as rector, and then a cross bill was filed; and the cross bill must have been suggested by that which appeared in the answer. At that time the rectory was vested in two trustees of a term for securing certain annuities, and also in a mortgagee. Now this bill was filed in 1817, and the cross bill was filed the following year; and I find by the report in *Cherry v. Legh*, that the bill against *Cherry* was not filed till 1820, which was after the answer was put in to the bill filed by *Glegg* and the other parties; and in this last bill, *Egerton* and *Tatton*, the trustees of the term, were made plaintiffs. That was not so in the original bill filed by *Glegg*. When this last case came to be tried in the *Exchequer*, two defences were set up, one of which was a denial of the plaintiff's title as rector; and this Court decreed, notwithstanding the trustees were in possession of the term for securing the incumbrancers, and notwithstanding the mortgagee had the legal title; yet, as all the annuities had been paid up to the time when the bill was filed; and as the mortgagee had been paid all his interest;

1835.

BELLWOOD
v.
WETHERELL.

(a) 1 Bligh, N. S. 302.

(b) *Id.* 306.

1835.

BELLWOOD
v.
WETHERELL.

that was a sufficient protection to the defendant, because he could not be called on again by the trustees or mortgagees, and, therefore, he was bound to account. That decree was confirmed by the House of Lords, and the very opinion of Lord *Eldon* on the hearing of the appeal, shews what was the object of the discovery claimed by the cross bill; and it appears clear that he thought there was a distinction to be drawn in these cases, and that it does not follow that if a plaintiff files a bill claiming tithes, that gives the defendant the right to file a bill to obtain from the plaintiff the evidence of his title.

It was said, indeed, by the counsel who supported the exceptions, that where a party is brought into equity as a defendant, he is in a different situation from a party seeking discovery as a plaintiff, and that he has a right to file a cross bill to obtain the discovery necessary for his defence; and in support of that position, the case is adduced where a defendant attacked by an ejectment files a bill of discovery. But the observation to be made as to that is simply this—where a party is in possession of an estate, and a perfect stranger comes to turn him out, alleging himself to be the person entitled, it is but reasonable that the party so attacked should have an opportunity of knowing the plaintiff's case; so far as whether he claims as heir at law—whether he claims under a devise—or whether he alleges any imperfection in the defendant's title deeds. There the defendant is taken by surprise, and therefore I can easily understand in such a case why, not the evidence, but the nature of the title, should be disclosed. But in cases of recent possession, where parties well know the nature of each other's titles, there is no ground to compel any such discovery as that which is here required. That appears to me to be an answer to the argument derived from the cases of ejectment.

There is another case which it is necessary to notice;

Moodalay v. East India Company (a). That was a case where a party in the *East Indies* held under the company, by what is called a cowl. He had been dispossessed by order of the company, and he was desirous of bringing an action to vindicate his right, and he filed his bill against the company for a discovery of the circumstances under which they had granted another cowl, and to know by what authority they had dismissed him. The Master of the Rolls in his judgment says, the company are bound to answer; but the question in that case was, whether the case were within the given limits within which suits will be entertained by courts of equity against the company; that was the main point decided, and upon that the Master of the Rolls was against the company. As to the other point, he said, they should not be prejudiced by discovering their title; so that in fact that point was not decided; and therefore the case, as regards the present question, is not an authority.

1835.
BELLWOOD
v.
WETHERELL.

There is, undoubtedly, a recent case of *Bolton v. The Corporation of Liverpool* (b), where, upon a bill filed for the discovery of documents affecting the right of the corporation to demand toll, the Court of *Chancery* ordered the defendants to produce certain cases which had been laid before counsel relating to the subject in dispute, those cases not having been prepared with reference to the existing proceedings. I confess I do not think that decision was warranted by the cases which were made the foundation of it. I should have decided it differently, and should not have allowed the production of those documents; at the same time, where a corporation claims a toll to be due from the inhabitants of a town, then I think it would be both expedient and just, not that the evidence of their title, but that the nature of their claim, should be discovered.

(a) 1 Bro. C. C. 468.

(b) 3 Sim. 467; 1 Myl. & K. 88. .

1835.

BELLWOOD
v.
WETHERELL.

The plaintiff in this suit does not suggest upon his bill any doubt whether he may not be put to additional expense, and be harassed again by some person claiming a paramount title to the rectory. He simply says, that the defendant is not rector; and that brings it to the naked question, shall he be allowed to call on the defendant to produce a deed, not because it makes out his own case—not to defend himself—but to expose the plaintiff to all the dangers of a discovery? The possession of the rector, without any adverse claimant, is *prima facie* evidence of his title; and if in any document to be so produced, a flaw should happen to be found, it would be a summary means to deprive the rector of his right, if that deed were exposed in a Court of equity, where other persons might take advantage of the defect. At law, the rector must prove his title, as in any other case, and the defendant might take advantage of any imperfection; but to allow such an application as the present, would be to enable the defendant in a tithe suit in every case, to call on the plaintiff to produce the particulars of his title. The case by which the general rule is entrenched upon, and which forms an exception to the rule, is where it is expedient that the defendant should be protected from any adverse right set up by a paramount claimant, and from agitating the matter over again.

Exceptions overruled.

1835.

BOND *v.* NORTHOVER.

Jan. 23rd.

THIS was a bill to set aside certain conveyances, alleged to have been obtained by the defendant from his uncle by fraud and misrepresentation. It contained a charge that certain papers and documents were in the possession or power of the defendant or his solicitor, whereby the truth of the several matters alleged in the bill would appear, but which the defendant refused to produce. The answer denied that the defendant had the possession or power of the papers and documents in question, but said nothing as to whether they were or had been in the possession or power of the solicitor. An exception was taken to the answer for insufficiency in this respect.

A charge in the bill that papers and documents are in the possession or power of the defendant or his solicitor, is not answered by a denial that they are in the possession or power of the defendant.

Sir *Charles Wetherell* and Mr. *G. Richards*, in support of the exception, contended, that a charge of this nature always applied to the physical or personal possession of the solicitor, not to his constructive possession.

Mr. *Simpkinson*, *contrâ*.—The possession of the solicitor is the possession of the party. The party denies that they are in his possession, and that is equivalent to saying that they are not in the possession of the solicitor.

The LORD CHIEF BARON.—If the solicitor got them *ad iudicem*, or if he has them with a lien upon them, they are not in the possession or power of the party, though in the hands of his solicitor. The answer, therefore, is not sufficient as regards the solicitor. It may be important for the plaintiff to know whether the solicitor has the documents; for he may amend his bill and make the solicitor a party.

Exception allowed.

LORD C. STEPHENS.

RICHARD LORD, the father of the plaintiff, being owner in fee of various freehold estates, by indentures of lease and release, dated the 28th and 29th days of May, 1827, conveyed a tract of 98 acres to the defendant by way of mortgage for securing the sum of 4000*l.* and interest. By indentures of lease and release, dated the 28th and 29th days of May, 1827, he conveyed another tract comprising 120 acres to *Booth Hodgetts*, by way of mortgage for securing the sum of 5000*l.* and interest.

For the reason of *Richard Lord* the father, in December, 1827, the county of Leicestershire in all the mortgaged premises being vested in the plaintiff *Richard Lord*, the son.

In January, 1832, the defendant being desirous of purchasing of the plaintiff the farm comprising the 120 acres, and of deducting from the purchase money what was already due to him on mortgage, entered into an agreement with the plaintiff for the purchase, and paid 10*l.* as a deposit. The agreement was as follows:—

Memorandum of an agreement made this 14th day of January, 1832, between *Richard Lord*, of *Barby*, in the county of Leicestershire, of the one part, and the Rev. *Richard Stephens*, of *Belgrave*, in the county of *Leicester*, of the other part. The said *Richard Lord* doth hereby agree to sell to the said *Richard Stephens*, and the said *Richard Stephens* doth hereby agree to purchase of the said *Richard Lord* the premises of 120 acres or thereabouts, now in the occupation of the said *Richard Lord*, free from all tithes and quit rents, but subject to the usual and accustomed taxes. And it is hereby declared and agreed, that the said *Richard Lord* shall, at his own expense, make out a good and marketable title to the said premises; and the said *Richard Stephens* shall be at the expense of his

own conveyances. That the purchase shall be completed on the first day of *July* next, when the said *Richard Stephens* shall pay the remainder of his purchase money, and the said *Richard Lord* shall execute a proper conveyance, &c. That nothing herein shall prejudice the mortgage between the said *Richard Stephens* and *Richard Lord*, the late father of the said *Richard Lord*, or the principal and interest and monies thereby secured, except that the said *Richard Stephens* shall be at liberty to deduct the amount thereof from the said purchase money. That the said *Richard Lord*, party hereto, shall, after the completion of this purchase, take and be permitted to rent and occupy the said premises, at a sum or amount equal to 4*l. per cent. per annum*, and interest, on the purchase money to be paid for the said premises, as tenant from year to year; and a proper lease or agreement be granted and accepted thereof, with the usual covenants in farming leases or occupations accordingly. And lastly, that the costs of this agreement shall be paid equally between the said parties; and that in case the title shall not be satisfactory to the said *Richard Stephens*, his heirs or assigns, or his or their counsel, these presents shall be void to all intents and purposes."

1835.
 LORD
 STEPHENS.

In *August*, 1832, a fiat in bankruptcy issued against the plaintiff, but was annulled by an order dated the 9th *February*, 1833. In *January*, 1833, the defendant caused a formal notice to be served on the plaintiff, stating, that in consequence of the delay which had taken place in making out the title to the premises contained in the written contract, under which it was agreed that the purchase should be completed on the first day of *July* then following; and in consequence and by reason of the bankruptcy or reputed bankruptcy of the plaintiff, whereby he was rendered unable and unfit to accept the defendant's lease, or become a tenant of the said farm to the defen-

1835.

LORD
&
STEPHENS.

dant, pursuant to the said contract, and for other reasons, he the defendant thereby gave the plaintiff notice that he should abandon and give up, and did thereby abandon and give up, the said purchase and the said contract, except as to the deposit of 100*l.*, which he thereby required to be returned, together with interest, or that he should take legal proceedings to recover the same.

The bill stating the foregoing facts, and charging that the delay had arisen on the part of the defendant, and that the same solicitor acted both for the plaintiff and the defendant until the bankruptcy, prayed a specific performance of the contract, and that the defendant might be restrained from proceeding against the plaintiff by ejectment, or for the deposit.

The defendant by his answer admitted all the material allegations of the bill, but said, that shortly after the date of the said contract a bill had been filed against the plaintiff, and also against *Hodgetts*, the mortgagee of the 120 acres, and against two other incumbrancers, praying a foreclosure in respect of a mortgage of the premises which had been executed by the plaintiff's father in *July*, 1830, for securing 1100*l.*, which suit was still pending in the Court of *Chancery*; that another foreclosure suit was also pending, which had been instituted by *Hodgetts*; that after the contract was entered into, the plaintiff fell into embarrassed circumstances, whereby he became incapable of properly occupying the said lands as tenant thereof, according to the terms of the agreement; and that the plaintiff had since the agreement been in possession of the premises, and had by improper modes of husbandry and farming greatly injured and deteriorated the said lands, and particularly the pasture lands thereof. He submitted, that, under these circumstances, he was justified in refusing to complete the contract, and that it was not his fault that it was not completed at the time agreed upon.

The defendant did not allege by his answer, nor did it appear from the evidence, that he was ignorant of the mortgage of 1830, at the time of his contract with the plaintiff.

1835.
 LORD
 v.
 STEPHENS.

On the part of the plaintiff, evidence was read, to shew that the lands were not mismanaged after the contract was entered into. It was proved by one of the witnesses, that in *September*, 1833, there was a meeting of the mortgagees, at which the defendant and his solicitor were present; that on that occasion a discussion arose connected with the contract for the purchase by the defendant; and that the defendant then claimed to have the sum of 700*l.* deducted out of his purchase money for injury and dilapidations accruing to the premises since the contract, which the deponent on behalf of the plaintiff thought unreasonable, and proposed to have left to arbitration; but that the defendant and his solicitor declined such proposal.

On the part of the defendant, it was given in evidence, that, in 1832, the plaintiff mowed about 67 acres of old pasture land; and that, in the following year, he mowed nearly the whole of the lands, it being a grass farm; that he carried off the produce without properly grazing the lands, or manuring them, &c., and that he neglected to repair the outbuildings. It was likewise proved that several distresses had been made upon the premises by the mortgagees, and, amongst them, by the defendant himself, for arrears of interest on the 4000*l.*

Mr. *Treslove*, and Mr. *Koe*, for the plaintiff.—The same solicitor acted for both parties until the bankruptcy; the delay therefore arose from the defendant's own agent; and, even if it were otherwise, time was not of the essence of the contract; and therefore the defendant could not rescind the contract upon a mere notice to that effect, however formal. The defendant complains of a deterioration of the property. That is not so to the

1835.

LORD
v.
STEPHENS.

extent complained of, and it arose from the difficulties in which the plaintiff was placed by the delay. Deterioration, however, of the property during the time required for completing the purchase is not a ground for rescinding the contract, though it may be the subject of an allowance to the purchaser: *Ferguson v. Tadman* (a). The circumstance of the estate being incumbered with foreclosures is no objection to the title; besides, if the purchaser had paid his money as he ought to have done, the plaintiff would have been enabled to pay off the mortgage. Then it is said that the plaintiff is not in a condition to continue the farm as tenant. But the agreement does not make it obligatory on the defendant to accept the plaintiff as his tenant. That is entirely optional; at all events, the plaintiff waives that right.

Mr. Boteler, and Mr. Blunt, for the defendant.—*First*, the agreement must be performed, if at all, in the entirety. It was a substantial part of the agreement that the defendant should look to the plaintiff as his tenant, at a rent fixed by the terms of the agreement. The plaintiff being unable to perform this condition properly, the agreement is at an end. [The *Lord Chief Baron*.—The tenancy was determinable at six months' notice.] Admitting that it is strictly so determinable, yet, if that stipulation was only a lure for larger purchase money, and colourable, the Court will not help the agreement. If the plaintiff entered into such a stipulation, with a view to annul it immediately, it was a breach of faith. Besides, it was agreed that a lease should be entered into with the usual covenants. *Secondly*, the agreement does not contain the usual stipulation that the plaintiff shall make a good title, but that, in case the title shall not be satisfactory to the defendant, the agreement shall be void. Therefore, if

(a) 1 Sim. 530.

1835.

LORD
v.
STEPHENS.

the objections raised by the defendant are fair and reasonable, the Court will not enforce the contract against him. Now the mortgage of 1830, and the foreclosure in consequence, is a circumstance affecting the title. The plaintiff has since been in all kinds of difficulties; writs of execution have been issued against him, and distresses levied upon the premises. Besides, having notice of the bankruptcy, it is difficult to say to whom we ought to pay the money. It is clear that the title cannot be made good without arrangement; it is therefore unsatisfactory. The defendant is not bound to accept it.

Mr. *Treslove*, in reply.—Granting that the embarrassments on this property were double what they are, that would be no objection to the title. To make out a difficulty of title there must be an adverse title: *Esdaile v. Stephenson* (a). Here they are all incumbrances under the plaintiff. If in this suit a reference were made to the Master, he would report that a good title could be made, upon the proper parties joining in the conveyance. Then, if those parties did not join, the bill might afterwards be dismissed; but that has nothing to do with the present defence. There are reasons to believe that the bill will not be dismissed. As to the concluding passage in the contract, it clearly does not mean that the defendant shall be at liberty to take an absurd or capricious objection to the title.

The LORD CHIEF BARON.—The two objections which have been raised on the part of the defendant appear to me to amount to nothing. The defendant clearly knew that the plaintiff was not affluent; he himself claimed interest for the 4000*l.*; he therefore knew that the plaintiff could not pay the interest of that mortgage. If he

(a) 6 Madd. 366.

1835.

LORD
v.
STEPHENS.

had made the tenancy of the plaintiff part of the consideration for the contract, by paying a larger sum for the farm on that account, that might have been a cause for rescinding the agreement, if he had found the tenant unable to carry on the farm. But he was cautious and attentive to his own interests, and, by a term in the agreement, he was not bound to keep the plaintiff as his tenant beyond a year. That was a term in it which makes the tenancy of no consideration. If there had been a lease for fourteen or fifteen years, and the tenant had become insolvent, it might have been a reasonable objection; but I cannot imagine that the contract is to be set aside because of the inability of the defendant to take the plaintiff as a tenant for a single year under such circumstances. With respect to what has been said relative to the form of the contract, I cannot construe it to mean that the contract should be binding on one party and not on the other. I think it must mean that the contract should be at end, in case there was a reasonable difficulty as to the title. There is nothing, therefore, in these two objections.

It then appears, that, in *September*, 1833, the defendant was willing to take the title, provided he could get 700*l.* allowed him for dilapidations. If at law he had taken his present ground of defence, he would have been answered, that, in *September*, he agreed to the contract, upon being allowed the 700*l.*, and that the parties only differed upon that. According to the ancient practice, unless the plaintiff first proceeded at law and recovered damages, he could not file his bill for specific performance. That is altered now, but still it is a criterion for the decision of a Court of equity. I cannot doubt of this case. At law the plaintiff must have succeeded. The agreement must be performed: the Master to consider to what extent the estate has been deteriorated.

1835.

Ex parte TAYLOR.—In the Matter of the LONDON and BIRMINGHAM RAILROAD COMPANY.

Jan. 29th.

THIS was a petition by a tenant for life of land purchased by the *London and Birmingham Railroad Company*, praying that the purchase-money might be invested in the *3l. per Cent.* Annuities, until a purchase of land could be found, and a reference to the Master to tax the petitioner his costs of the petition, and that the same, when taxed, might be paid by the company.

By the 4th section of the *3 Will. 4, c. xxxvi.*, incorporating the company, it is enacted that all money to be raised by the act shall be first applied in paying the expenses of obtaining the act, “and all other expenses preparatory or relating thereto, and the remainder of such money shall be applied in and towards purchasing lands, and making and maintaining the railway, and otherwise in carrying the act into execution.”

The 39th section enacts, that the money paid by the company for the purchase of any land of any corporation, tenant for life, &c., shall, if it exceed 200*l.*, be paid into the Bank of *England*, in the name and with the privity of the Accountant-General of the Court of *Exchequer*, until the same shall, by order made upon petition in the Court of *Exchequer*, be applied in the discharge of the several incumbrances mentioned in the act; or until the same shall, by a like order, be laid out in the purchase of other lands, to be settled to the like uses as the lands which shall be so purchased stood settled or limited; “and in the meantime, and until such purchase can be made, the said money may, by order of the said Court, upon application thereto, be invested by the said Accountant-General in his name, in the purchase of *3l. per Cent.* Consolidated, or *3l. per Cent.* Reduced Bank Annuities, or in government or real securities; and in the mean time, and until such annuities or securities shall be ordered by the

Where an act of Parliament, establishing a railway company, directs that the money to be paid for lands to be purchased by the company shall be paid into the Bank, until the same shall, upon petition, be applied in the purchase of other lands; and, in the meantime, until such purchase can be made, shall, upon application to the Court, be invested in the funds; and that the expenses and costs attending such purchase shall be paid by the company:—*Held*, that, under the latter clause, a party applying to have the money invested in the funds is not entitled to the costs of the application.

1835.

Ex parte
TAYLOR.

said Court to be sold for the purposes aforesaid, or shall be called in or cancelled, the dividends, interest, and annual produce thereof, shall, from time to time, by order of the said Court, be paid to the party who would, for the time being, have been entitled to the rents and profits of such lands so to be purchased and settled."

The 42nd section is stated in a former page (a).

Mr. *Webster*, for the petitioner, contended that, under the 4th section of the act, the Court has jurisdiction to make the order as prayed, notwithstanding the 42nd section, which, he said, related only to cases where no investment, intermediate between the payment into the Bank and the purchase of land, is required. The effect of throwing the costs on the petitioner would be, that for some time he will actually be deprived of all income from the purchase-money.

Mr. *Bacon*, *contrà*.

The LORD CHIEF BARON.—The 42nd section does not extend to the costs of investing the money in the funds, and the 4th is only for the purpose of carrying the act into effect, and does not apply to this case. Then, as no mention is made of these costs in the 39th section, they must be borne by the petitioner.

(a) P. 166, where this section is by mistake called the 41st.

Feb. 21st.

LOVELL *v.* HICKS.

Order to take the bill *pro confesso* discharged, and answer permitted to be filed, under the circumstances, and upon certain terms.

THE original bill in this cause was filed on the 28th of *May*, 1833. The defendant *Hicks*, together with several other defendants, put in a joint answer, to which exceptions were taken, but which exceptions were waived by the plaintiff soon afterwards amending his bill. Previous to the filing of the amended bill the defendant

Hicks went to *America*, and there remained until the month of *January*, 1835. In the meantime process of contempt to sequestration had issued against him; and, in pursuance of an order, dated the 12th of *December*, 1834, the amended bill had been taken *pro confesso*, as against him. The other defendants having answered, and issue being joined, evidence had been gone into on the part of the plaintiff.

1835.
LOVELL
v.
HICKS.

Mr. *Heathfield*, for the defendant *Hicks*, now moved to discharge the order for taking the bill *pro confesso*, and for leave to put in an answer to the amended bill upon affidavit, stating the fact of the defendant having been absent in *America*, as above mentioned.

Mr. *Blunt*, for the plaintiff, opposed the motion.

It being alleged that *Hicks* had not returned more than a fortnight since; and it appearing that the cause had abated by the death of a defendant, so that no additional delay would be occasioned, the *Lord Chief Baron* thought it reasonable that *Hicks* should be allowed to put in an answer, which was ordered accordingly, on the following terms; namely, that process of contempt should be kept on foot until the sufficiency of the answer should be determined; that *Hicks* should allow the evidence already gone into on the part of the plaintiff to be read as against him; and that he should pay all the additional costs to be occasioned by the indulgence.

See *Williams v. Thompson*, 2 Bro. C. C. 280, S. C. 1 Cox, 413; *Hearne v. Ogilvie*, 11 Ves. 77; *Hughes v. Owen*, 1 Fowl. Exch. Pr. 199, *contra*.

1835.

Jan. 30th.

Feb. 17th.

By a marriage settlement, stock was assigned to trustees, upon trust to pay the interest and dividends to the husband for life, and in case he should survive the wife, upon trust to transfer the said stock to the husband, "his executors, administrators, or assigns, to and for his or their own use and benefit;" but in case the wife should survive the husband, upon trust during her life to pay the interest and dividends as she should appoint, and, after her decease, upon trust to transfer the stock "unto the executors or administrators of the said G. M. (the husband) to and for their own use and benefit." The wife survived the husband, and took out administration of his effects, and claimed an absolute interest

in the whole *corpus* of the stock:—*Held*, that she was not entitled.

Seemle, that a limitation in a settlement "to the executors and administrators of A., for their own use and benefit," unconnected with any other limitation shewing more specifically who are to take, is void for uncertainty.

A party who, under a misapprehension of his legal rights, parts with his property for a *bona fide* and valuable, but not an adequate consideration, cannot have the transaction set aside on the mere ground of mistake.

MARSHALL v. COLLETT.

BY an indenture dated the 4th *September*, 1802, and made between *George Marshall*, since deceased, of the first part, the plaintiff *Ann Marshall*, the wife of the said *George Marshall*, of the second part, and *John Meysey*, *Richard Cox*, and *Joseph Pridham* of the third part, it was declared and agreed, that the said *John Meysey*, *Richard Cox*, and *Joseph Pridham*, and the survivors and survivor of them, and the executors and administrators and assigns of such survivor, should stand possessed of the sum of 4000*l.*, 5*l.* *per Cent.* Navy Bank Annuities, which had been transferred into their joint names, and the dividends and interest thereof, upon trust to permit and suffer the said *George Marshall*, or his assigns, to receive for his or their own use and benefit the dividends and interest thereof, during the joint lives of himself and the said plaintiff; and in case he should survive the said plaintiff, then from and immediately after her death, upon trust to transfer the said stock unto the said *George Marshall*, his executors, administrators, or assigns, *to and for his or their own use and benefit*; but in case the said plaintiff should survive the said *George Marshall*, then, upon further trust, that the said trustees, and the survivors, &c. should, from and after the decease of the said *George Marshall*, receive the dividends and interest of the said sum of 4000*l.*, 5*l.* *per Cent.* Navy Bank Annuities, during the life of the said plaintiff, and pay and dispose of the same dividends and interest as the said plaintiff, notwithstanding her coverture, should, in manner therein mentioned,

appoint, for her sole and separate use; and after the decease of the said plaintiff, surviving the said *George Marshall* as aforesaid, upon trust to assign and transfer the said sum of 4000*l.*, 5*l.* *per Cent.* Bank Annuities, unto the executors or administrators of the said *George Marshall*, to and for their own use and benefit. And it was thereby provided and agreed, that the said plaintiff should accept, and she did thereby accept, the provision made for her by the present deed, in lieu of a certain annuity which had been secured to her, and in lieu of dower or thirds, and free bench at the common law, &c.

George Marshall died intestate, leaving the plaintiff and four children surviving him, and letters of administration of his personal estate were granted to the plaintiff.

Upon the death of *George Marshall*, it was considered that the plaintiff, under the Statutes of Distribution, was entitled to one-third of the 4000*l.* stock comprised in the settlement; and, accordingly, the same having in the interim been converted by act of Parliament into a sum of 4200*l.* New 4*l.* *per Cent.* Bank Annuities, the trustees transferred one-third of it to the plaintiff; the remaining 2800*l.* stock being reserved for the children, in equal shares, subject to the life interest of the plaintiff under the settlement. One of the children afterwards died intestate and unmarried, whereby one-fourth of his share accrued to the plaintiff, and the residue to the surviving children.

In the beginning of the year 1834, the plaintiff and two of the children agreed to sell their interest in the 2800*l.* stock to the defendant *Collett*; and, accordingly, by an indenture of assignment, dated the 9th *April*, 1830, to which the plaintiff and the two children and *Collett* were parties, the life interest and all other the share of the plaintiff, and also the shares, both original and accruing, of the two children, were, for a valuable consideration, assigned to the defendant *Collett*; and, shortly after the execution of that indenture, the 2800*l.* stock was transferred

1835.

MARSHALL
&
COLLETT.

1835.
MARSHALL
v.
COLLETT.

into the joint names of *Richard Cox*, the only surviving trustee, and the defendant *Collett*. *Richard Cox* afterwards died intestate.

The bill, which was filed against *Collett* and the plaintiff's three children, having stated the foregoing facts, alleged, that, since the plaintiff had executed the said indenture of assignment of the 9th *April*, 1834, she had been advised, that, under and by virtue of the limitations to the executors or administrators of the said *George Marshall*, to and for their own use and benefit, contained in the said indenture of the 4th *September*, 1802, she became entitled as administratrix of her said deceased husband, for her own absolute use and benefit, to the whole of the said sum of 4000*l.* stock, mentioned and comprised in the said indenture; that, upon the decease of her said late husband, and upon the plaintiff becoming his administratrix, the trustees ought to have transferred to her the said sum of 4000*l.* stock; that she entered into the said contract for the sale to the said *John Collett* of her supposed life interest in the said sum of 2800*l.* New 3*l.* 10*s.* *per Cent.* Annuities, in total misapprehension of her right therein and thereto, and in utter ignorance that she was absolutely entitled to the proceeds of the said sum of 2800*l.* stock, to which, by the ways and means aforesaid, the said trust fund had become reduced.

The bill prayed that the indenture of the 4th of *September*, 1802, might be established, and the plaintiff declared absolutely entitled, for her own use and benefit, to the 2800*l.* stock, part of the proceeds of the 4000*l.* stock comprised in the said indenture, and that the same might be transferred to her accordingly; that it might be declared that the plaintiff executed the said indenture of the 9th *April* last under a mistaken apprehension of her rights and interests under the said indenture of the 4th *September*, 1802; and that the said indenture of the 9th *April* last might be delivered up to the

plaintiff upon payment by her to the defendant *Collett* of what she had received for her supposed life interest. But if the Court should be of opinion that the last-mentioned indenture was valid, then that the 2800*l.* stock, subject to her life interest, might be secured for such persons as might be entitled thereto at her death. That in the mean time *Collett* might be restrained by injunction from making any transfer or sale of the said 2800*l.* stock, &c.

1835.
 MARSHALL
v.
 COLLETT.

Mr. *Simpkinson* now moved for an injunction, according to the prayer of the bill:—*First*, the plaintiff, in the character of administratrix to *George Marshall*, is beneficially entitled to the *corpus* of the stock. By the terms of the settlement, the *corpus* of the stock, the wife surviving the husband, is to be transferred by the trustees to the executors, administrators, and assigns of the husband, for their own use and benefit. It will be contended, that executors, in cases like the present, are trustees for the next of kin; but in *Evans v. Charles* (a), under a bequest to the “personal representatives,” an administratrix was held to take beneficially. That case has, to a certain extent, been questioned, but never overruled. In *Sanders v. Franks* (b), the bequest was to the executors or administrators of the testator’s wife “for their own use and benefit;” and Sir *Thomas Plumer* said that those words gave the administrator a beneficial interest. *Secondly*, the plaintiff having assigned her interest to the defendant *Collett*, under a misapprehension of her rights, has a right to have that sale set aside, and to be placed in the same situation as if she had not executed the deed.

Mr. *Boteler* and Mr. *G. Richards*, *contrà*.—The construction sought to be put upon this instrument would lead to consequences which never could be intended.

(a) 1 Anstr. 128. See *Baines v. Ottey*, 1 Myl. & K. 465.

(b) 2 Madd. 147.

1835.
 MARSHALL
 v.
 COLLETT.

The result might be to give the ordinary the power of disposing of the property. *Evans v. Charles* is not law. In *Sanders v. Franks*, the only point in question was, whether the power of appointment was good or bad. The present point was not agitated, though mentioned by Mr. *Heald* in his reply. What is stated in *Wellman v. Bowring* (a) as the ground of decision in *Sanders v. Franks* is incorrect; it did not turn upon the limitation to the executors and administrators. *Sanders v. Franks* has been called a case of questionable authority (b). *Collier v. Squire* (c) was decided on the intention of the party, and on the faith that it was to be the property of that person whose executors and administrators are named. As to the second point, there is no allegation of fraud against the defendant *Collett*, or that he was the means of bringing the plaintiff into her present situation. He paid a valuable consideration for what he has got, and a Court of equity cannot take it from him. The parties to the deed covenant that they are lawfully entitled to their shares.

Mr. *Simpkinson*, in reply.

THE LORD CHIEF BARON.—I should do wrong to suspend my judgment in a case in which I entertain no doubt. The first question arises upon the construction of the settlement; and with reference to that, only two cases have been cited for the plaintiff. Without saying more upon those cases, I must observe that the one is not a sufficient authority to act upon; the other is not a decision on the point now before the Court, but only contains the *dictum* of a highly respectable Judge. The present question could not have arisen in that case; if it had, it might have been carried to a higher tribunal. The only point for consideration was, whether the power was duly executed;

(a) 1 S. & S. 24.

(b) 3 Sim. 333.

(c) 3 Russ. 467.

there was no question between the administrator and the next of kin. Those cases, therefore, are no authorities on the present occasion: the one because it pushes the construction contended for too far; the other because I can only treat it as a *dictum*, not as a judicial authority.

Then look at the words of the settlement. The deed is executed *inter vivos*, and there is no reason why the same words, conveying the same interest, should, in different parts of the deed, receive a different construction. Common sense tells us that we must be bound by the same construction wherever they occur. Where the words "for their own use and benefit" first occur, who could have contended against the husband, or against his next of kin? And if so, whatever doubts might have existed, if they had been only used in reference to the event which has happened, yet, under the present circumstances, what reason is there to say that they are not to be construed in the same manner in the second case as in the first? Mrs. *Marshall's* second thoughts were not the best. The arguments of her counsel have been very favourable to her cause, but they have not been sufficient to raise any doubts in my mind.

It is not necessary to go into the other part of the case; though even there Mrs. *Marshall* has not a better equity than the defendant *Collett*. She has stood by, and has been a party to various instruments, and has seen him pay herself and her children the full value of their interests. He was a purchaser for a valuable consideration. It is too much to say that he was a witness or a party to a fraud; or that she having represented her own interest as so and so, and her children's as so and so, can now say, I made a mistake in regard to my legal rights, and now call upon you to become a trustee for me. If he had given a much less value for the purchase than it was worth, and she had called upon the Court to rescind the contract on that ground, the result might have been different. But that is not so here.

1835.

MARSHALL
v.
COLLETT.

1835.
 MARSHALL
 v.
 COLLETT.

It is a maxim of equity, that parties making a mistake in matters of fact shall not be held bound by acts committed by them under such mistake. When, however, they make a mistake in law, they cannot afterwards be heard to say that the contract shall, on that account, be set aside. When contracting parties act without fraud, on a *bonâ fide* apprehension of their interests, it is not because it was discovered some time afterwards that these interests are differently modified, that therefore the purchase is to be considered unavailing. That, I should say, was not a ground of equity for the Court to proceed upon. Therefore, though I am not so peremptory upon this point as on the former, yet, upon both grounds, I think that the injunction must be refused.

Feb. 17.

On this day the cause came on to be heard on demurrer.

Mr. *Boteler* and Mr. *G. Richards*, for the demurrer.

Mr. *Simpkinson* and Mr. *Rudall* for the bill.—The words used are executors *or* administrators, which means that they should take by purchase. If it had been intended that they should take through the husband, the word “and” would have been used. It might have been intended to give the wife that chance. In the first clause of the settlement, the representatives take by limitation; in the last, they take absolutely. By this construction effect is given to all the words of the settlement. In this case it so happens that the wife, who has given a valuable consideration for her interest, is the party entitled. She has given up her right to dower and free bench, and an annuity of 200*l.* per annum. The Court cannot look to the absurdity of the limitation, supposing it to be absurd, but only to the language of the instrument. *Evans v. Charles* (a), *Jennings v. Gallimore* (b), *Sanders v. Franks* (c).

(a) 1 Anst. 128.

(b) 3 Ves. 146.

(c) 2 Madd. 147.

Mr. *Boteler*, in reply, was stopped by the Court.

1835.

MARSHALL
v.
COLLETT.

The LORD CHIEF BARON.—It is enough to decide this case on the words of the settlement, without going further and resorting to general principles. Here it is clear that the words “for their own use and benefit” are not used in the sense contended for by the plaintiff. It is urged that, under the first clause, the executors and administrators take by limitation, and in the last by purchase; and that otherwise the Court must reject from the last clause the words “own use and benefit.” I think that as the same words are used in both the clauses, they must in each case receive the same signification. The words in question may be rejected from the first clause without affecting the sense or altering the construction; and I think that the same words may be rejected from the second also. The two clauses must be construed in the same way.

But I do not stop here. The case of *Evans v. Charles* is clearly not law; and *Sanders v. Franks* is not an authority for the proposition advanced. Suppose, on a marriage settlement being made, it was intended to give one of the parties the power of appointing beneficially to his executor; might it not be said, “to such person as *A. B.* shall appoint executor by his will, or if he should fail of appointing, to such persons as shall appear to be his next of kin at his death?” But according to the words of the present settlement, if the construction contended for be adopted, either a creditor, or such person as the bishop shall appoint, may take. In that view of the case, the very vagueness of the limitation is sufficient to make it void. The demurrer must be allowed.

1835.

Jan. 30th,
Feb. 18th.

TOLDERVY v. COLT.

Testator devised his real estates to trustees, upon trust that his daughter *M.* should until twenty-one, if sole and unmarried, receive thereout an annuity of 60*l.* and that she should thereafter and until thirty-one, if sole and unmarried, receive a further annuity of 40*l.*; but in case his said daughter should marry without the consent of his trustees, then she should only receive an annuity of 50*l.*, and the said estates should immediately upon such marriage be in trust for the children of *M.*, under such limitations as in the will mentioned; and for default of such issue, in trust for the testator's sister *S.* Provided, that if *M.* should marry with the consent of the trustees, the estates should be in trust for her and her husband for their joint lives and

the life of the survivor, with remainder to the children of the marriage, under the same limitations as before. *M.* married with the consent of the trustees, and died without issue:—*Held*, that the remainder to *S.* was not conditional, depending on *M.*'s marriage *without* consent; consequently, that notwithstanding *M.*'s marriage *with* consent, the remainder to *S.* took effect.

JAMES BOWMAN CLARKE, by his will, after directing his just debts and funeral expenses to be paid, devised and bequeathed unto his friends, *William Toldervy* and *Thomas Davis*, their heirs and assigns, all his freehold messuages, lands, tenements, and hereditaments, situate, lying, and being in the county of *Hereford*, and elsewhere, “ upon the trusts, and subject to the powers, provisoes, and limitations hereinafter expressed and declared, of and concerning the same (that is to say); in the first place, to the intent and purpose that my daughter *Mallett* shall from time to time until she shall have attained the age of twenty-one years, if sole and unmarried, have, receive, and take annually out of the rents and profits of the said premises, one annuity or yearly sum of 60*l.*, to be paid to her by the said *William Toldervy* and *Thomas Davis*, their heirs or assigns, by four even and equal portions, at or upon four days in every year, (that is to say), &c.; and to the further intent that my said daughter *Mallett* may from time to time thereafter, and until she shall have attained the age of thirty-one years, if she shall so long remain sole and unmarried, have, receive, and take out of the rents, issues, and profits of the said premises, one further or other annuity or sum of 40*l.*, to be paid and payable to her by the said *William Toldervy* and *Thomas Davis*, or the survivor of them, or the heirs or assigns of such survivor, &c. But it is my will, and I do hereby declare, that in case my said daughter *Mallett* shall, either before she shall have attained the age of thirty-one years, or afterwards, marry without the consent

of the said *William Toldervy*, if living, and after his decease, without the consent of the said *Thomas Davis*, first had and obtained in writing under the hands and seals of them respectively, then she shall be paid for and during the term of her natural life only one annuity or yearly sum of 50*l.*, and not the other annuities, or either of them. And from and immediately after the marriage of my said daughter without such consent as aforesaid, I will, direct, and devise, that all the said freehold messuages, lands, tenements, and hereditaments, with their and every their appurtenances, shall be in trust for all and every the child and children of the said *Mallett*, lawfully to be begotten, in such shares and proportions, manner and form, as they the said *William Toldervy* and *Thomas Davis*, and the survivor of them, or the heirs of such survivor, shall from time to time direct and appoint," &c. In default of appointment, the testator directed that the said freehold lands and hereditaments should be in trust for all the children of *Mallett*, as tenants in common in fee, with cross remainders between them, and if but one child, in trust for such surviving or only child in fee. "And for default of such issue, then in trust as to one moiety or half part of the said freehold messuages, lands, tenements, hereditaments, and premises, for my sister, *Lady Frances Burrard*, and her assigns, for and during the term of her natural life; and from and immediately after her decease, in trust and for the use of my sister *Sarah*, the wife of the said *William Toldervy*, and her heirs and assigns for ever. And as to the other moiety of the said messuages, lands, tenements, and hereditaments, with the appurtenances, in trust and for the use of the said *Sarah Toldervy*, her heirs and assigns for ever." The testator then devised certain leasehold hereditaments to his trustees upon the same trusts and under the same limitations as he had declared concerning his freehold estate, or as near thereto as the different natures of the respective

1835.

TOLDERVY
v.
COLT.

1835.
 TOLDERVY
 v.
 COLT.

properties would permit. Then followed this proviso:—
 “ Provided always, and it is my will, that in case my said daughter shall in the lifetime of the said *William Toldervy* marry with his approbation and consent, or after his decease, with the good-liking, approbation, and consent of the said *Thomas Davis*, or the legal representative of the survivor of them, then and in such case it shall and may be lawful for them, or the survivor of them, or the legal representative of the survivor of them, to convey the said freehold messuages, lands, tenements, and hereditaments, and to assign the said leasehold messuages, lands, tenements, and premises unto such person and persons, use and uses, as they or the survivor of them, or the legal representative of the survivor of them shall think proper; so that the same is conveyed and assigned upon trust only, and for the use of my said daughter *Mallett*, and such husband as she shall marry with such consent as aforesaid, for and during their joint lives, and the life of the survivor of them (but not without impeachment of waste), with remainder to the issue of the body of my said daughter, in such manner, shares, and proportions, as they my said trustees, or the survivor of them, shall think proper, direct and appoint; and for want of such direction, limitation, or appointment, in such shares and proportions, as are hereinbefore limited respecting the same.” The testator then directed an additional allowance to be made to his daughter at the discretion of his trustees, until she should attain the age of thirty-one, if she so long remained sole and unmarried. He then provided for the maintenance of his daughter’s children, in case she married without consent. And then reciting, that he was entitled to the remainder in fee of certain hereditaments in *Whitechapel*, he gave and devised the same unto his sisters, Lady *Frances Burrard* and *Sarah Toldervy*, and to the heirs and assigns of the said *Sarah Toldervy*.

The testator died without revoking his will, leaving

his two sisters and his daughter *Mallett* surviving him. *Mallett* attained her age of twenty-one, and afterwards, with the consent of *William Toldervy*, married the Reverend *James Colt*. Mr. and Mrs. *Colt* died without ever having had any issue. *Sarah Toldervy* survived her sister *Lady Frances Burrard*, and devised all her real estates to *James Bayley Toldervy* in fee. *James Bayley Toldervy* died, having made a settlement of the property comprised in the above will in favour of his wife and children.

The present bill was filed by the widow of *James Bayley Toldervy* against Sir *John Colt* (who upon the death of his uncle, Mr. *Colt*, had taken possession of the property), against the heir-at-law of the surviving trustee under the will, and against the children of *James Bayley Toldervy*. It prayed delivery of possession of the property and title-deeds to the plaintiff; an account of the rents and profits received by the defendant *Colt* since the death of his uncle; a receiver; injunction, &c.

The defendant, Sir *John Colt*, having put in his answer, admitting the possession of certain deeds relating to the property in question, Mr. *Temple* and Mr. *Wilcock*, for the plaintiff, moved for their production.

Mr. *Rolfe* and Mr. *Cooper* resisted the motion on two grounds:—*first*, that supposing the plaintiff had any title under the will, she had no right to call upon the defendant to disclose his title;—*secondly*, that the plaintiff had no title under the will.

Upon the first point, the Court gave judgment in favour of the plaintiff at the close of the argument. Upon the second point, judgment was given on a subsequent day by

The LORD CHIEF BARON.—This, it must be confessed, is an obscure and ill-drawn will; but I formed my opinion

1835.

TOLDERVY
v.
COLT.

Feb. 18th.

1835.
TOLDERVY
v.
COLT.

upon it, and was prepared to deliver that opinion at the time the motion was made: it seemed, however, the wish of one of the parties, that it should be stated as a case for the opinion of the Court of *Exchequer*. I reserved my judgment, in order to see whether the will appeared sufficiently doubtful for that purpose. With a view, however, to save expense to the parties, I thought it right, in the first instance, to submit the will to the inspection of my brother *Parke*. His opinion upon it is so much in confirmation of my own, that I think it unnecessary that a case should be stated.

The question is, whether *Sarah Toldervy* the sister of the testator, took any interest under this will, his daughter *Mallett* having died without issue, and that turns on the following circumstances:—The testator, by his will, devised the estate to trustees, upon trust to pay an annuity of 60*l.* a year to his daughter till she attained twenty-one if she remained unmarried, and then to increase it by 40*l.* a year if she remained unmarried till she was thirty-one. There is no provision for her marriage after thirty-one; but in case she married without the consent of the trustees, then he limits her annuity to 50*l.* a year for her sole use and benefit, excluding the husband altogether, and gives estates to her children as tenants in common, with cross remainders between them; and then comes a clause to the effect, that, in default of such issue, the property shall be in trust as to one moiety for one of the sisters for her life, and after her death to the other sister; and as to the other moiety, in trust also for that other sister, under whom the plaintiff in this cause claims.

The question then is, whether that remainder to the sisters is a conditional remainder depending on the previous condition as to the daughter marrying without the consent of the trustees. I am of opinion, taking the whole will together, that it does not depend on that condition, but is absolute. The doubt arose upon the subsequent proviso, as to what should be done in case she

married with the consent of the trustees. In that case they were to convey the estate to such persons as they should think fit, upon trust, that she and her husband should have an estate for their joint lives and the life of the survivor, with remainders to the children in the same manner as before, omitting to make any mention of the sisters. Now, it appears to me, that the testator did not contemplate that his daughter would marry with the consent of the trustees; and, therefore, he introduces a proviso to let in the daughter and her husband, in case there should be a consent, without intending to alter any other part of the will; and he refers to the former provisions, in order to shew that the children are to have the same interests, whether the marriage should take place with consent or without. He then considered that he had made an ample provision for his sisters by the remainder in fee after the extinction of the issue of his daughter, and that that provision was not affected by the subsequent proviso contained in the will. He consequently took no occasion to alter the provision already made for his sisters.

In my opinion, therefore, the estate limited over to the sisters is not conditional; and therefore, on this motion, the plaintiff is entitled.

See *Mackinnon v. Sewell*, 2 Myl. & K. 202.

—◆—

In re BIGG.

THIS was a petition for the re-transfer of certain stock to the petitioners under the provisions of the 56 Geo. 3, c. 60. That statute authorizes all stock upon which dividends have remained unclaimed for ten years to be transferred to the account of the commissioners for the reduc-

to it; it is sufficient if they prove their legal claim.

1835.

TOLDERVY
v.
COLT.

Feb. 9th.

To obtain a re-transfer of stock under the provisions of the 56 Geo. 3, c. 60, it is not necessary for the petitioners to shew that they are beneficially entitled

1835.

In re
Bigg.

tion of the national debt, in the books of the Governor and Company of the Bank of *England*. By the 5th section of the statute, the Bank of *England* is authorized to re-transfer the stock to any person who shall shew to the satisfaction of the governor his right or title thereto; but in case the governor shall not be satisfied of the legality of such claim, the Courts of *Chancery* or *Exchequer* may, upon the petition of such claimant, verified by affidavit, make such order for the re-transfer of the stock, or otherwise, as shall appear to be just.

The petitioners in the present matter had already obtained an order of reference to the Master to ascertain who were the persons legally interested in the stock in question; and the Master had found that the petitioners as the legal personal representatives of one *Bigg*, who was the survivor of three persons, in whose joint names the stock was originally invested, were the persons legally interested therein. They therefore now prayed a re-transfer to them of the stock.

Mr. *Boteler* for the petition.

Mr. *Wray* for the Crown.—The order of reference omits a very material term. The inquiry should have been as to the persons beneficially interested in the stock. If these persons cannot be found, the Crown is entitled to it: *Middleton v. Spicer* (a). It is clear that the three persons in whose names the stock was originally invested were mere trustees, of whom *Bigg* was the survivor.

Mr. *Boteler* in reply.—If before the expiration of the ten years they would have been entitled, they would be equally so now. The act takes away no right which the parties had before it passed; the mere suggestion of a trust cannot vary the case.

(a) 1 Bro. C. C. 201.

The LORD CHIEF BARON.—All that this Court has to do is to see to the legality of the claim. It is not necessary for the Court to pursue all the ramifications of the trust.

1835.

In re
Bigg.

Order as prayed. The Attorney-General
to have his costs out of the fund.

BENNETT v. ATKINS.

Feb. 10th.

BENJAMIN MITCHELL, by his will, after bequeathing various legacies and weekly payments, devised certain real estates to *John Prickett* and *Samuel Atkins*, upon trust for sale, and to invest the produce in the funds, and apply the interest thereof to pay the weekly payments, till his daughter *Mary Mitchell* should attain twenty-one; and then upon trust to appropriate a sufficient part of the said funds for the weekly payments and for an annuity of 100*l.* to his wife, and to pay the remainder to his daughter. He bequeathed the residue of his personal estate upon the same trusts, and appointed *Prickett* and *Atkins* his executors. The testator died in *March*, 1816. His widow married the defendant *Kimpton*. *Mary Mitchell* attained twenty-one in *February*, 1833, and married the plaintiff *Bennett*. *Prickett* died, and the defendants *George Prickett* and *Francis Prickett* were his personal representatives.

An executor or trustee, who retains a balance in his hands, and against whom a suit is instituted, will not be charged with the costs of the suit, except under circumstances of considerable misconduct.

Where a suit is instituted with unnecessary haste against an executor or trustee who has not grossly misconducted himself, he will be allowed his costs.

The present suit having been instituted by *Bennett* and his wife, for the administration of the testator's estate, the Master reported, that upon his death the executors sold part of the real property, and with the produce purchased 1700*l.* Consols, which was now standing in the name of the Accountant-General to the credit of this cause. He likewise reported that there was due to the testator's estate 199*l.* from the defendant *Atkins*, and 306*l.* from the

1835.

BENNETT
v.
ATTKINS.

estate of *Prickett*, whose representatives declined to admit assets, the estate being in Chancery.

The cause now coming on to be heard on further directions, it was proposed by the plaintiffs that the Master should tax the costs of the plaintiffs and the defendants *Kimpton* and wife, as between solicitor and client; that the same should be paid by a sale of a sufficient part of the 1750*l.* Consols; and that the defendant *Attkins* should repay such costs.

Mr. *Jervis* and Mr. *Wilbraham*, for the plaintiffs.—The defendant *Attkins* has had this balance of 199*l.* in his hands for eighteen years. The executors of the other trustees have denied assets. The object of the bill therefore is, to bring the whole fund into Court; and *Attkins* must pay interest on the money detained, and the costs of the suit. *Seers v. Hind* (a), *Caffrey v. Darby* (b), *Piety v. Stace* (c), *Rocke v. Hart* (d). An executor may be charged, although there is no specific trust for an investment. Here there is a specific trust, which makes this case stronger than that of mere executors, and a breach of trust has been committed. The trustees should have given in their accounts as soon as the infant attained twenty-one, instead of putting her to the expense of coming into a Court of equity. The costs have been rendered necessary by their default. The observation of Sir *William Grant*, in *Ashburnham v. Thompson* (e), that costs are not to be given against executors in all cases, applies to executors only, and not to trustees.

Mr. *Tatham* for the defendants *Kimpton* and wife.

Mr. *Wray* for the defendant *Attkins*.—This defen-

(a) 1 Ves. J. 294.

(b) 6 Ves. 488.

(c) 4 Ves. 620.

(d) 11 Ves. 58.

(e) 13 Ves. 404.

dant was made trustee and executor jointly with *Prickett*, who was the principal manager of the testator's property, and conducted the sale of the real estates. The question is, whether the fact of *Attkins* having 199*l.* in his hands is a foundation for making him pay the costs of the suit, *Prickett* being insolvent. Nothing has been alleged against him by the bill or the Master's report, except that the money was not paid, the fact being, that this is a balance in his hands, which he is ready to pay. It was a reasonable balance to have in his hands. It was necessary for him to have something to go on with.

1835.
 BENNETT
 v.
 ATTKINS.

Mr. *Seton* for the defendants, the executors of *Prickett*.—The case of *Seers v. Hind* is overruled by *Ashburnham v. Thompson* (a), and *Tebbs v. Carpenter* (b). The present case must be governed by *Sammes v. Rickman* (c), which is an authority to shew that there is no ground for claiming either interest or costs against these defendants.

Mr. *Jervis*, in reply.

The LORD CHIEF BARON.—The good sense of the rule as to costs in cases of this nature, is contained in the judgment of Sir *William Grant*. The costs must depend on the circumstances of each particular case. In this case, it is said, that the object of filing the bill was to bring the money into Court, one of the trustees being insolvent. That might be so; but as my attention has not been called by the bill to any misconduct alleged against them, I cannot, (for the money was not considerable), take it for granted that they had no possible pretence for keeping it, or that they made interest of it. This lady attained her age before the accounts were delivered, and a very short time afterwards the bill was filed. What ground was there for

(a) 13 Ves. 402.

(b) 1 Madd. 199.

(c) 2 Ves. 36.

1835.
 BENNETT
 v.
 ATKINS.

filing a bill to compel *Attkins* to do what he might have done without it? I am asked to do two things: first, to infer impropriety against him; and secondly, to declare, without knowing the truth of the fact, that he was not ready to account. How do I know, that, if called upon, he might not have paid the money? For any thing that appears to the contrary, it might have been in his hand, and he ready to pay it. Shall I then make him pay the costs of a suit which has been so unnecessarily brought against him? If, indeed, the sum retained were so large as to raise any suspicion on the subject, that might form an ingredient in the case for the good judgment of the Court to act upon. But that is not so here.

There is no ground, therefore, for decreeing costs against *Attkins*. As to the executors of the party who is said to be insolvent, they are in no respect to blame, and must be allowed their costs out of the fund in Court. If they are obliged to pay their own costs, they will have to seek repayment from the insolvent's estate, which they ought not to be compelled to do.

His Lordship, after some further discussion, allowed *Attkins* his costs out of the money due from him. The costs of the other parties were likewise allowed out of the fund.



Feb. 11th.

BAKER v. CARTER.

A trustee who has purchased the trust property and sold it at a profit, and who has been compelled by a suit in equity to refund that profit, will not, except under circumstances affecting him with moral fraud, be charged with the costs of the suit.

CHARLES CARTER, of *Eton*, boat-builder, by his will gave and devised all and singular his real estates which he might die possessed of, unto his brother *James Carter* the elder, and another trustee, upon trust to re-

to refund that profit, will not, except under circumstances affecting him with moral fraud, be charged with the costs of the suit.

ceive the rents of the same, and to pay and apply them unto and to the use and benefit of his wife *Charlotte Carter*, and his two daughters, until they should attain their respective ages of twenty-one years. And from and after the decease of his said wife, he gave his real estates to his two daughters, as tenants in common, their heirs and assigns for ever. And he gave and bequeathed all and singular his stock in trade, household goods, plate, china, and all other his effects, unto his said wife *Charlotte Carter*, upon trust to carry on the business for the benefit of herself and his two daughters, and after her decease, to his two daughters share and share alike. By a codicil he appointed *James Carter* the elder and another person his executors. *Carter* alone proved the will in *December, 1815*.

The bill, which was filed by the two daughters and the husband of one of them, against *Charlotte Carter, James Carter* the elder, and his son *James Carter* the younger, charged various acts of fraud against all the defendants in relation to the testator's estate, and prayed a general account.

The charge against Mrs. *Carter* was not substantiated. That against *James Carter* the elder and his son was to a certain extent proved, and arose out of the following transactions. In 1816, eight leasehold houses of the testator being in mortgage to one *Sawyer*, the mortgagee called in his mortgage money. *Carter* the elder having no assets of the testator in his hands, advertised these premises for sale in the *Windsor Express*, and offered to sell them to the mortgagee, who refused to buy them. They were then valued by a surveyor at 936*l.*, and, as sworn by *Carter* in his answer, he again endeavoured to procure a purchaser for them, but without success. Eventually he sold them to his son *James Carter* the younger, for 936*l.*, the consideration money being, as he admitted, his own money, and not that of his son. Six years after-

1835.

BAKER
v.
CARTER.

1835.

BAKER
v.
CARTER.

wards, the corporation of *Windsor*, requiring the scite of these premises for the purpose of building the new bridge of *Windsor*, purchased them of *James Carter* the younger for 1200*l.*, and 50*l.* expenses.

Upon the hearing of this cause before Lord *Lyndhurst*, C. B., at the sittings after *Trinity* Term, 1832, his Lordship was of opinion that the before-mentioned transaction could not be supported in a Court of equity; it was therefore ordered, that the defendant *James Carter* the elder should account for the sums of 1200*l.* and 50*l.*, with interest at 4*l. per cent.*, from the 6th *July*, 1822, which was the time of the sale to the corporation of *Windsor*; and should also account for the rents and profits of the premises from the death of the testator till the 6th *July*, 1822.

The cause coming on to be heard upon further directions, the main question was, whether the defendant *James Carter* the elder should pay the costs of the suit.

Mr. *Jervis* and Mr. *Dixon* for the plaintiffs.—The question as to costs must be governed by the cases of *Tebbs v. Carpenter* (a), *Ashburnham v. Thompson* (b), *Whitchcote v. Lawrence* (c), and *Piety v. Stace* (d). In the two latter cases the decision was against the trustee, not on the ground of direct fraud, but because he had gained an advantage from the trust funds. The present is a clear case of fraud, and accordingly the trustee has been ordered to refund what he has gained with interest; he must therefore pay the costs. If it be said that the son was not a necessary party, the answer is, that he was implicated in the fraud. The bill prays an account against all the defendants. It would have been sufficient to have made *Carter* the younger a defendant, for the mere pur-

(a) 1 Madd. 199, 207.

(b) 13 Ves. 402.

(c) 3 Ves. 740.

(d) 4 Ves. 620.

pose of praying costs against him. [The *Lord Chief Baron*.—I know it is said in one or two cases that you may make a person charged with fraud a party to a bill for the purpose of praying costs against him. I should be better satisfied with those *dicta*, if a reason was given for them. No doubt if several persons are parties to a fraud, they ought to be made parties for the sake of a discovery, but not merely for costs. It appears to me that *Carter* the younger was not a necessary party to this suit. If you had intended to set aside the sale made by *Carter* the younger, you should have made the corporation of *Windsor* parties. But you do not seek to set aside the sale; therefore all you can get is an account from the father.]

1835.
 BAKER
 v.
 CARTER.

Mr. *Simpkinson* and Mr. *James Watson* for the defendants *Carter* the father and *Carter* the son.—If these defendants had acted with fraud, the cases cited would have been apposite. But the principle on which those cases depend is entirely in favour of these defendants. *Carter* the elder was not a specific trustee. He did not take under the first clauses of the will, there being freehold property to answer the description in that clause. He was only by construction of law, in the character of executor, held to be a trustee. It is very doubtful, therefore, whether he is bound by the general rule of equity as regards trustees in these cases. *Naylor v. Winch* (a). Besides, the object of the bill is to get relief from *Charlotte Carter*, charging, that instead of fulfilling the trusts reposed in her for the benefit of her children, she has converted the property to her own use. The bill, therefore, relates to other matters than the fraud of the trustee, and on that ground he is not liable for the costs. *Tebbs v. Carpenter* (b). Here, however, there was, morally speaking, no fraud; and Lord *Lyndhurst* was of that opin-

(a) 1 S. & S. 555.

(b) 1 Madd. 199.

1835.

BAKER
v.
CARTER.

ion at the hearing. His Lordship set aside the transaction solely on technical grounds of equity.

Mr. *G. Richards* for the defendant *Charlotte Carter*.

Mr. *Jervis*, in reply.

The LORD CHIEF BARON.—These questions of costs, which rest in the discretion of the Court, give rise to much controversy and great difference of opinion, because the cases are so unlike one another in their details, that it is difficult to lay down any general rule respecting them. Here the circumstances are of a peculiar nature. I agree that where a trustee purchases the trust estate for his own benefit, the simple obvious rule is, that the purchase must be set aside; but it does not therefore follow that such a transaction bears the character of fraud in every case. On the contrary, the trustee may do it under circumstances beneficial to the trust estate, and to the principal parties concerned. A trustee, therefore, is not necessarily to be punished in cases of this nature; though, if he violates his trust, and is guilty of fraud, no doubt the Court will oblige him to pay the costs which by his misconduct the cestui que trusts have been put to. In the present case, I think the leasehold estates passed under the general devise, because it is not probable that the testator meant to die intestate as to any part of his estate. He devises all his real estate, all his effects, every thing that he had. Then the case stands thus:—Mrs. *Carter* had these estates, together with other effects, specifically devised to her as trustee; and she insisted originally that *Carter* the elder had no right to interfere with that property. It afterwards became a question whether he had sufficient assets, or if he had not sufficient assets, whether there must not be a sale to pay off the mortgage debt. The sale took place, and nothing intervened to prevent it. It was not proved that when sold it was not properly sold.

1835.

BAKER
v.
CARTER.

It was not argued that the executors did wrong in selling it. If they did, Mrs. *Carter* ought to have prevented it. It is clear, therefore, that what they did in 1816 was acquiesced in by Mrs. *Carter*, who was an interested party. In that respect, therefore, there was no fraud in the sale.

But then it is said that the defendant bought of himself, and that the purchase by his son was a mere colourable purchase. If there were any evidence that the property was worth much more than it was sold for, that would be a circumstance from which to infer fraud against him, and that he took advantage of his situation as trustee. But this is not proved, nor even suggested. What then is the situation of the parties? Mrs. *Carter* having a specific devise of the property, with remainder to her daughters, though at first reluctant, afterwards acquiesces in the sale by the executor, and admits his interference for the purpose of paying the debts. It happens, that six years afterwards, the property is wanted for the purpose of making the new approaches to *Windsor* bridge. It is probable that the purchasers are induced to give a larger price for it, from being almost forced to buy it. It comes then to the question whether, if an executor should purchase the testator's property, and give the estate the full benefit of the purchase, and at any time afterwards under extraordinary circumstances which no one ever contemplated, the property should be sold at a greater value than that for which it was bought, then not only by an inexorable rule of equity is the money to be paid back to the testator's estate, but the executor is to be accused of fraud and made to pay all the costs. If he had made no profit by the purchase, the parties interested would have been satisfied. Subsequent events cannot vary the moral conduct of the defendant, though they may alter his legal responsibility. There is no ground, therefore, for charging him with fraud, or visiting him with the costs of this suit.

1835.

BAKER
v.
CARTER.

But there is a part of the case as to which the defendant is not altogether exonerated from some blame. He put in three answers. If the first answer had been full and specific, it would have been unnecessary to put the plaintiffs to the expense of proceeding further, and procuring further evidence to bring the facts before the Court. He never did admit that he received the rents and profits of the premises; and by his first answers there was either no denial of that fact, or no denial sufficient to prevent the necessity of entering into evidence. Where a defendant does not answer distinctly, but thinks fit to conceal certain facts, or answers in such a manner as to oblige the plaintiff to proceed further in the suit, the plaintiff is of necessity compelled to pay additional costs. The defendant, therefore, ought to pay those costs which have resulted from the period of his first answer, and which have been occasioned by the insufficiency of that answer, so far as it relates to the sale of these estates. So far as his answers relate to his conduct as executor, he must have his costs out of the fund.

His son's is not a case which calls for any costs against him. There was no fraud whatever in the son. I do not see clearly why he was a necessary party, the bill not seeking to set aside the release. Except, perhaps, for the purposes of discovery, he was clearly not a necessary party. He is, therefore, entitled to his costs.

1835.

PIERCE v. SCOTT.

Feb. 17th.

JOHN HARVEY PIERCE, by his will dated the 28th March, 1818, after specifically bequeathing his furniture and other personal estate except his leasehold property, gave, devised, and bequeathed to four trustees, whom he appointed his executors, their heirs and assigns, all his real estate, and also his leasehold estates and all his interest therein, upon certain trusts mentioned in his will, for the benefit of his children. The will then contained the following clause: "And my will is, that if, at my decease, any mortgage or other debts remain unpaid, then my trustees aforesaid shall sell my interest in my said leasehold estates, and so much of my freehold estates as may be sufficient to pay off all such said debts and mortgages, provided the majority of the said trustees deem it best so to do; in which case my will is, that the three houses in *Hermitage Street* be first sold, after the leasehold estates are disposed of; then the house and land at *Upchurch*, in the county of *Kent*; and if these are not sufficient, then the public-house premises at *Union Stairs*, reserving, if possible, the ground rent of four houses on the north side of the said *Hermitage Street*, and the public-house, *The Edinburgh Castle*, with the wharf, warehouses, stable, and dwelling-house adjoining, situate in *Wapping*, near the *Hermitage* aforesaid, in the county of *Middlesex*."

Where lands are devised in trust for the payment of the testator's debts generally, with a direction that his estate at *A.* shall first be sold for that purpose, and if that be not sufficient, then his estate at *B.*; a good title cannot be made to the estate at *B.*, unless the vendor shews clearly that the trust remains unsatisfied, and that the produce arising from the sale of the *A.* property would, beyond all doubt, be insufficient for the purposes of the trust.

The testator died soon after the date of his will. Three of the trustees disclaimed, in consequence of which the execution of the trusts devolved on the remaining trustee, who was the eldest son of the testator, and plaintiff in this suit.

In December, 1832, the plaintiff caused the *Edinburgh Castle* and the other premises at *Wapping*, which were freehold, to be put up to sale by public auction. The

1835.

PIERCE
v.
SCOTT.

defendant was declared the purchaser, and paid his deposit. Upon his afterwards objecting to the title, and refusing to complete the purchase, the present bill was filed against him for a specific performance of the contract. It contained an allegation that the other property mentioned in the will, and thereby directed to be sold before the property sold to the defendant, is subject to mortgages and other charges, to the value or more than the value thereof. That the said premises sold to the said defendant as aforesaid, are also subject to a mortgage debt and arrears of an annuity to a considerable amount, although the same will be discharged out of the said defendant's said purchase-money; and that there are also various other debts of the testator to a large amount still owing and unpaid; and that there are no other funds available for the payment thereof than the defendant's aforesaid purchase-money.

The cause having been heard, and the Master in pursuance of the usual reference having reported that a good title could not be made to the premises in question, the plaintiff excepted to the Master's report.

Mr. *Rogers*, in support of the exception.—Whenever a trust for sale under a will depends on facts which involve the administration of the testator's estate, or any other facts which would involve the purchaser in great trouble, the purchaser is protected from seeing to the propriety or necessity of the sale. This rule is not merely for the purchaser's protection, but for that of every one who leaves his property to be administered by trustees. It will be admitted that executors are justified in selling leaseholds which are specifically devised; and that if they are improperly sold, and there are other assets, the remedy is not against the purchaser, but amongst the legatees. *Co. Litt.* 290 b., note (1), sect. 14. These general prin-

ciples would apply to freehold property situated as this is, and would be quite sufficient to dispose of this case. The bill, however, expressly alleges that there are debts, and that the only fund available for their payment is the defendant's purchase-money. It may be contended, that the length of time since the testator's death, which took place fifteen years ago, raises a presumption that the debts have been paid, and consequently that the sale is improper. It is, however, clearly established, that when property is bequeathed upon trust for the payment of debts, a creditor, though only by simple contract, may at any time within twenty years from the testator's death, file a bill to enforce that trust: *Jones v. Scott* (a). No purchaser, therefore, within a period less than twenty years, has a right to set up any presumption of this nature against the propriety of the sale.

1835.

PIERCE
v.
SCOTT.

Mr. *Treslove* and Mr. *Kenyon Parker*, *contrà*.—No doubt, where real property is devised for the payment of the testator's debts generally, or even for raising so much money as the personal estate shall be deficient for that purpose, the purchaser will not be bound to see to the propriety of the sale; but it is otherwise where the debts are specified. Here the mortgage debts are specified debts, which the purchaser is bound to see paid. It is not even clear that the testator did not mean to exonerate his personalty. Besides, there is no authority for saying that where a testator directs his estates to be sold in succession, the executors may sell the last first, and come into a Court of equity to compel the purchase. The Court will not compel a purchaser to take a doubtful title. *Shapland v. Smith* (b). The lapse of fifteen years is strong evidence that the debts are paid.

(a) 1 Russ. & Mylne, 255. (b) 1 Bro. C. C. 74.

1835.

PIERCE

v.

SCOTT.

Mr. *Rogers*, in reply.—If the allegation in the bill is sufficient, the plaintiff must have a decree. It is not necessary for him to prove by evidence that there are debts; and the lapse of fifteen years is not notice that there are no debts. There may be bond debts. At law, twenty years are allowed for claiming a bond debt.

The LORD CHIEF BARON.—I feel considerable doubt upon the point. I will not say that it is clear that the purchaser is not liable to be compelled to complete his purchase; at the same time, there is a suspicion in regard to the payment of the debts. Suppose the circumstances are such as raise a suspicion that the plaintiff is not complying with the terms of the trust, the question is, whether that is not notice? Now it is not likely the creditors went so long as is suggested without enforcing their demands. I do not like to lay down general propositions unnecessarily, but if I were a purchaser, I should say that this was not a safe or prudent purchase.

Exception overruled; bill dismissed with costs.

Feb. 20th.

LEIGH v. MACAULAY and Another.

The foreign agent of a mercantile house in London, dealing in African pro-

duce, was appointed executor of *A.*, a merchant at *Sierra Leone*, with directions to sell the testator's property, and invest the proceeds in the Bank of *England*. The agent accordingly wrote to his principals in *London*, advising them of consignments which he should make to them of some of *A.*'s property, and directing them to place the proceeds to his credit as executor of *A.* The consignments were made, and the merchants placed the proceeds to a separate account, namely, that of *A.*'s estate:—*Held*, that the goods were specifically and not generally consigned, and that the produce of the consignments was trust money in the hands of the merchants, which, upon a motion in a suit filed against them by the representative of *A.* for an account, they were bound to pay into Court.

When a Court of equity traces out trust money in the hands of a person who has not *prima facie* right to hold it, that money must be paid into Court.

1835.

LEIGH
v.
MACAULAY.

ship, under the firm of *Z. Macaulay & Babington*. A great part of their business consisted in exporting and consigning goods for sale to *Sierra Leone*, and importing into *Europe* African produce, consigned to them for sale. They also carried on a similar business at *Sierra Leone*, and from the year 1819 till 1829 (with some interruptions arising from absence and other causes) *Kenneth Macaulay* acted as their agent at *Sierra Leone*, and as such agent procured and made to them various consignments of goods. He did not, however, confine his dealings to the business of the defendants, but from time to time acted as the agent of other persons.

In 1818 *William Henry Leigh*, a merchant of *Sierra Leone*, made his will, whereby, after appointing *Kenneth Macaulay* his executor, and requesting him to sell the whole of his property, he directed that the proceeds of the sale, after the payment of certain legacies mentioned in his will, should be placed by his executor in the Bank of *England* for the benefit of his children. The testator died soon after making his will, which was proved at *Sierra Leone*, but not in *England*, by *Kenneth Macaulay*, who thereupon took possession of the testator's property and effects.

In the latter part of the year 1818, the defendants received letters from *Kenneth Macaulay*, announcing his intention of consigning to them a quantity of ivory, palm oil, and other goods, which he described as belonging to the late Mr. *Leigh's* estate. In one of these letters he directed the defendants to sell the goods, and to "put the net proceeds to my credit, as executor of *Leigh's* estate, and not to the credit of my account with you." In the following year the defendants again received letters from *Kenneth Macaulay*, informing them that he had sent other goods belonging to the estate of the late *W. H. Leigh*, in one of which he spoke of "the estate having credit in our books for every article as it is received."

1835.
 LEIGH
 v.
 MACAULAY.

In pursuance of these letters the defendants opened in their books in *England* an account, headed, "Dr. the estate of the late *W. H. Leigh*, in account with *Z. Macaulay & Babington*, Cr.", and such account was entered in a ledger, journal, and other books. *Kenneth Macaulay*, from time to time, consigned to the defendants the goods mentioned in the letters, and also a great variety of other goods belonging to the testator's estate. These the defendants accordingly sold, and, on the occasion of each sale, they rendered to *Kenneth Macaulay* an account headed in the following manner:—"Account sales of (*article*) received per (*ship*) from *Sierra Leone*, and sold by order of Mr. *K. Macaulay*, on account of the estate of the late *W. H. Leigh*." In these accounts the defendants charged the estate of *W. H. Leigh* with freight, brokerage, and other usual charges. The sales were entered in the ledger and journal as made "on account of *W. H. Leigh*, by order of *K. Macaulay*."

In the month of *September*, 1826, an account was rendered by the defendants to *Kenneth Macaulay*, which was headed, "Dr. the estate of the late *W. H. Leigh*, in account with *Z. Macaulay & Babington*, Cr." In this account they gave credit to the estate of *Leigh* for 3033*l.*, as for the net proceeds of the several consignments; and they debited that estate with various disbursements and losses. In *April*, 1828, and *July*, 1828, similar accounts were rendered, and the balance due to *Leigh's* estate on the last of these accounts amounted to the sum of 1965*l.*

In *June*, 1829, *Kenneth Macaulay* died, having by his will appointed the defendant, *Z. Macaulay*, his executor. In *August*, 1833, letters of administration of the goods and effects of *W. H. Leigh* were granted by the Prerogative Court of *Canterbury* to *James Leigh*, the son of *W. H. Leigh*, who in the same year filed his bill against the defendants, stating the foregoing facts; that *Kenneth Macaulay* had died greatly indebted to the estate of *W.*

H. Leigh; that the monies received by the defendants on account of *W. H. Leigh's* estate had not been invested by them for the benefit of that estate, but had been mixed with their own monies, and applied to their own uses; charging that *Kenneth Macaulay* and the defendants were partners, and that they were liable for his deficiencies as well as their own in regard to *W. H. Leigh's* estate, and praying a general account of the personal estate of *W. H. Leigh*, which had come to the hands of the defendants, or any person for their use.

The defendants, by their answer, stated that they considered themselves accountable for the proceeds of the consignments to *Kenneth Macaulay* alone. They denied that they were in any manner agents for the estate of *W. H. Leigh*, and they submitted that they were not accountable to that estate. They alleged that the opening a separate account in their books for *W. H. Leigh's* estate, and the heading of the various accounts in the manner mentioned in the bill, was done solely for the convenience of *Kenneth Macaulay*, and in order to enable him to keep a distinct account of *Leigh's* estate. They admitted the balance of 1965*l.* to be due from them on the account mentioned in the bill; but they stated that account to be a special, and not a general account. They alleged that, in a general account, *Kenneth Macaulay* was their debtor to a very large amount, and that he, in fact, died insolvent, though not, as they believed (and for which belief they stated reasons,) indebted to the estate of *W. H. Leigh*. They denied the existence of any partnership between themselves and *Kenneth Macaulay*.

The bill was filed on the 19th of *December*, 1833. The defendants, before filing their answer, applied for further time, upon affidavits stating that they had sent to *Sierra Leone*, but that the accounts which they expected from thence had not yet been received. This application was granted by the Court upon terms. The defendants,

1835.

LEIGH
v.
MACAULAY.

1835.
 LEIGH
 v.
 MACAULAY.

however, omitted to comply with those terms, and filed their answer on the 12th of *July*, 1834.

Mr. *Simpkinson*, for the plaintiff, now moved that the sum of 1965*l.*, with certain deductions, might be paid into Court.—*Kenneth Macaulay* consigned these goods to the defendants, not on a general account—not on his own account—but ear-marked as portions of the testator's estate, and for the benefit of that estate. The transactions were placed to a separate account in the books of the defendants, both in *England* and at *Sierra Leone*. The accounts rendered by the defendants to *Kenneth Macaulay* related specifically to the testator's estate; and, upon those accounts, the sum in question is the admitted balance due to that estate. The plaintiff contends that, in fact, a much larger sum is due. That the defendants deny; but there is a sufficient admission in the answer that this sum in particular is due. They admit that they never have accounted with *Kenneth Macaulay* for any part of this balance, but that they paid it to their own bankers on their own account, and mixed it with their own money. Being consignors of produce specifically consigned to them, which they were to carry to a particular account, they had no right to apply the produce in this manner. They dispute the plaintiff's title to call them to account. The plaintiff, however, has a clear right to do so, as the legal personal representative of *Leigh*. Even legatees may call consignees to account, under such circumstances as these. *Wilson v. Moore* (a). They say they are only answerable to *Kenneth Macaulay* as his representatives. Now one of the defendants is himself the representative of *Kenneth Macaulay*. [He was then stopped by the Court.]

Mr. *G. Richards*, and Mr. *James Parker*, for the defendants.—The case of *Wilson v. Moore* is inapplicable.

(a) 1 Mylne & Keen, 126.

1835.

LEIGH
v.
MACAULAY.

There the parties acted fraudulently towards the persons interested in the testator's estate. Here the transactions in question took place in the usual course of business: there was no fraud or breach of trust. The property came into the hands of the consignees not upon trust, but as of absolute necessity. Without the assistance of the defendants, or some other person resident in this country, it could not have been converted into money. The defendants, no doubt, were generally liable to *Kenneth Macaulay*, as between consignees and consignor; but they were not further or in any other character liable. That being so, they had a right to apply the proceeds of these consignments in discharge of the debt due from *Kenneth Macaulay* to themselves. The separate heading of the accounts, which was done entirely for the convenience of *Kenneth Macaulay*, can make no difference in this respect. But, even supposing the defendants to be liable to account with the plaintiff, your Lordship will not order the money to be brought into Court immediately, but will direct the usual decree to be taken. This is not a real but an apparent balance. Upon a general account a large sum will be found due to the defendants. They ought not, therefore, upon an interlocutory application, to be compelled to pay into Court a mere isolated sum due upon a special account.

The LORD CHIEF BARON.—The money must be paid into Court. I remember, when I was young in the profession, a stronger case than this, which occurred in the House of Lords (a). A family resident in *Scotland* had a relation who died in the *West Indies*. A friend of theirs, who was in the *West Indies* at the time this event happened, took out administration of the estate of the deceased, and collected several sums of money then due to the estate. He had several debts to pay for the intestate,

(a) *Bogle v. Stewart*, Dom. Proc. 1801.

1835.

LEIGH
v.
MACAULAY.

but he handed over the money to certain persons who were merchants and bankers in *Scotland*, stating that it belonged to the intestate's estate. He did not direct them to place the remittances to a separate account, but he sent the very bills belonging to the intestate indorsed to them; therefore they had notice to whom the property belonged. He afterwards sent to *Scotland* to inform the bankers that the estate would literally realize a considerable sum of money, but that there were debts which he would have to pay; and he begged they would lend him 2000*l.* or 3000*l.*, being part of the money which he had remitted to them. The bankers paid over the money to the administrator, and afterwards the relations of the intestate instituted proceedings in *Scotland* against the bankers; and the Court of Session made a decree in their favour. Upon appeal from this decision to the House of Lords, I urged in favour of the bankers that the administrator was alive, and ought to have been made a party to the suit, inasmuch as he had an interest in the money for the purpose of paying the debts; but Lords *Eldon* and *Thurlow*, who heard the appeal, observed, that it was the rule in equity to follow trust money wherever it was to be found, and bring it into Court; and that, in the case before them, the very circumstance of the administrator writing for the money was an additional reason for supposing that it was not safe in his hands. I thought at the time that this was strange doctrine. In that suit, however, which was simply between the legatees and bankers, the House of Lords ordered that the money should be paid over to the plaintiffs. Now here the money sent over by *Kenneth Macaulay* is appropriated. You cannot apply it to discharge the debts due from him to the defendants. Even at law you cannot set off *A.*'s money against *B.*'s debt. The defendants received these letters in the capacity of trustees; they knew when they received them that *Kenneth Macaulay* was executor for *W. H. Leigh*. It is

said that he was not, in fact, a debtor to that estate; but this at least is doubtful, and I cannot omit altogether from my consideration the circumstance of the length of time which they have taken for their defence. The motion, however, must be granted, on the principle that when a Court of equity traces out trust money in the hands of a person who has not *prima facie* a right to hold it, that money must be brought into Court.

See *Bowsher v. Watkins*, 1 Russ. & Myl. 277.

1835.
 LEE
 v.
 MACAULAY.

M'LACHLAN v. ROB.

Feb. 20th.
 Mar. 2nd.

ANDREW ROB and *Ralph Rob* carried on business in co-partnership, as cattle dealers; the former living in the county of *Stirling*, the latter in the county of *York*. In *August*, 1808, *Andrew* died intestate, and his widow, who afterwards married the plaintiff *M'Lachlan*, took out letters of administration of his personal estate and effects. In 1817, proceedings were instituted in the Court of Session by Mrs. *M'Lachlan* and others, against *Ralph Rob*, for the purpose of obtaining an adjustment of the partnership accounts, and payment of what was due to herself and her daughter from the estate of *Andrew Rob*. A report was made in the Court of Session, by which a considerable balance was found due to the plaintiff; but before any final decree was had in the suit, *Ralph Rob* died, having appointed his widow, *Mary Rob*, his executrix. The suit was then revived in the Court of Session against *Mary Rob*, who for some time joined in the accounts which had been directed to be taken, but ultimately pleaded that she lived in *England*, and was not amenable to the jurisdiction of the Court, and that plea was allowed.

The common order for rehearing, obtained upon an application made after the expiration of six months from the time the decree was pronounced, will be discharged for irregularity; but upon a special case stated by petition, and verified by affidavit, the Court will grant a rehearing, though the ordinary time for making the application has expired.

In consequence of this decision, the present suit was instituted by Mrs. *M'Lachlan* and her husband, against

1835.
 M'LACHLAN
 v.
 ROB.

Mary Rob, praying for the same relief as had been sought from the Court of Session; and a decree was pronounced on the 13th of *July*, 1833, by which it was referred to the Master to take an account of the dealings and transactions of the late partnership, and also of the personal estate of *Ralph Rob*; and the Master was to be at liberty, if he thought fit, to adopt the proceedings of the Court of Session, and he was to make to all parties all just allowances.

Although this decree was pronounced on the day above mentioned, it was not finally settled until *February*, 1834. A state of facts was, in *April* following, taken into the Master's office by the plaintiffs, who contended that the proceedings and accounts taken in *Scotland* should be adopted by the Master. The defendant, on the other hand, objected to this for various reasons; and especially because in those accounts compound interest had been charged against her. The plaintiffs then submitted that the Master might adopt those proceedings and accounts in part only. The Master, however, was of opinion that, having regard to the wording of the decree, he was not at liberty to adopt the accounts and proceedings partially, but that he must either adopt them wholly or not at all.

Under these circumstances, the plaintiffs having obtained the common order for rehearing the cause, for the purpose of varying the decree, so as to allow the parties to adopt any part of the proceedings of the Court of Session—

Mr. *Jervis* moved to discharge that order for irregularity, contending that, according to the rule of Court stated in *2 Fowler*, 199, no application for rehearing a cause can be made after six months have expired from the time of pronouncing the decree. He also cited *Drake v. Hopkins* (a), *Bowyer v. Bright* (b), and *Milford v. Milford* (c).

(a) Bunb. 309.

(b) M'Clel. 483.

(c) 1 M'Clel. & Y. 150.

Mr. *G. Richards*, *contrà*, was proceeding to contend that there were circumstances which took this case out of the general rule; but *per*

1835.
 M'LACHLAN
v.
 ROB.


THE LORD CHIEF BARON.—There ought to have been a special application in this case: I cannot, in this form, hear the special circumstances. The plaintiffs must give notice of a petition, upon affidavit, to amend the decree, or for a rehearing. I cannot treat the order of the Court as a nullity. The meaning of it is, that a rehearing shall not take place, as a matter of course, after six months. The order for rehearing must be discharged with costs, with liberty to the plaintiffs to commence *de novo*.

ON a subsequent day, the plaintiffs presented their petition verified by affidavit, stating the material facts of the case, and praying for a rehearing notwithstanding the expiration of the six months. It was likewise stated upon affidavit, that the accounts which had been taken in *Scotland* were very voluminous, and that the proceedings before the Master were conducted as expeditiously as the rules and regulations of the Master's office would permit.

Mar. 2nd.

THE LORD CHIEF BARON was of opinion that a sufficient ground had been made out for deviating from the general rule, and made the order as prayed (*a*).

(*a*) See the next case.

1835.
*March 2nd.*

Upon a proper case, stated by petition, and verified by affidavit, the Court will relax the general order of the 13th November, 1731, which requires that all applications for a rehearing shall be made within six months after the decree is pronounced (a).

HALFORD v. HALFORD.

JUDGMENT in this cause having been pronounced on the 1st *July*, 1834, various discussions took place between the parties as to the form of the minutes of the decree to be founded on that judgment, and the decree was not finally settled until the 20th *February*, 1835. On the 23rd of that month, the minutes of the decree, as settled, were delivered by the defendant's solicitor to the plaintiffs' solicitor, who, on the same day, delivered them to his clerk in Court, with instructions to draw up and enter the decree without a moment's delay. It was accordingly drawn up and delivered over to the defendant's clerk in Court, on the 24th *February*, and it was entered and passed on the 27th.

The plaintiffs now presented their petition for a rehearing, verified by affidavit, stating the foregoing facts; and also that the petitioners had been theretofore prevented from applying for a rehearing, because the decree had not been passed and entered in due time; it being the practice of this Court not to permit any application for a rehearing until the minutes of the decree are settled, and the decree is passed and entered.

On the part of the defendant, the affidavit of his solicitor was read, stating his belief that the original intention of the plaintiffs was to appeal from the decree, and not to have the cause reheard; and that the discussion which had taken place arose from the plaintiffs wishing to insert in the minutes additional matter, for the purpose of improving their case upon appeal. The deponent had never been acquainted with the intention of the plaintiffs to petition for a rehearing until the 27th *February*.

(a) See the last case.

Mr. *Kindersley* for the petition.

1835.

HALFORD
v.
HALFORD.

Mr. *Barlow*, *contra*, contended that, under the circumstances, the fault of the delay rested with the plaintiffs, and that they were not entitled to the indulgence of the Court; that the rule of Court as to the time of presenting a petition of rehearing was peremptory, and had never been relaxed, unless, perhaps, in very extreme cases. He cited *Cutten v. Sanger* (a) and *Milford v. Milford* (b).

The LORD CHIEF BARON observed, that it was by a mere accident that the plaintiffs were prevented from making an application for a rehearing till six months had elapsed; and he granted the prayer of the petition.

(a) 3 Y. & J. 374.

(b) 1 M'Clel. & Y. 150.

TAYLOR v. SHEPPARD.

Feb. 23rd.

THE plaintiffs in this suit carried on trade at *Manchester* as woollen-cloth manufacturers, under the firm of *Taylor, Son, & Gibson*. The defendants carried on the like trade at *Uley*, under the firm of *Edward Sheppard & Sons*.

In *April*, 1830, the defendants received an order from a person of the name of *Hulme*, to supply him with woollen manufactured goods, on behalf of the house of *William Hulme & Co., Manchester*; and the defendants answered that order by the requisite supply. Further orders were afterwards made, and the dealings between *Hulme*

The creditors of *A.* having issued a fiat in bankruptcy against him, and having at the close of the proceedings under the fiat received notice, by means of the examination of the bankrupt and others, that *A.* was only the agent of *B. & Co.*, proceeded nevertheless to sign *A.*'s certificate:—*Held*,

that this was not an election by the creditors to treat *A.* as their sole debtor.

A bill in equity to set aside a verdict is not sustainable, where the facts on which the bill is founded, though discovered since the trial, might have been established at the trial upon cross-examination.

1835.

TAYLOR
v.
SHEPPARD.

and the defendants, with some interruptions which will be noticed presently, continued till *September*, 1832, when the balance due from *Hulme* to the defendants amounted to 564*l*. On the 26th of that month, *Hulme* committed an act of bankruptcy. On the 11th of the following month, a fiat in bankruptcy issued against him, on the petition of the defendants; and soon afterwards he was declared a bankrupt. In *November*, the defendants proved part of their debt, and on the 10th of *December* they signed the bankrupt's certificate.

During the investigations which took place under *Hulme's* bankruptcy, several of his creditors, amongst whom were the defendants, having heard that the plaintiffs were liable for the debts of *Hulme & Co.* entered into the following agreement:—"We, the undersigned, having credited *William Hulme & Co. of Manchester* with woollen cloth or other goods to a considerable amount, and having proved or being entitled to prove our several debts under a fiat in bankruptcy issued against the said *William Hulme*, and having reason to believe that the said *William Hulme* was not carrying on business on his own account, but merely as the agent of Messrs. *Taylor, Son, & Gibson*, of *Manchester* aforesaid, do hereby for ourselves and our respective partners severally agree to and with each other to bear, pay, and contribute our proportion of the expense in the prosecution of any action or proceeding that Messrs. *Edward Sheppard & Sons of Uley* may be advised to take against the said *Taylor, Son, & Gibson*, to be calculated at an equal pound rate upon the amount of our respective debts. And we do hereby also severally agree to leave in the hands of the assignees of the said *William Hulme*, the dividends to become payable to us and each of us under the said fiat. And we do hereby authorize the said assignees to apply the same dividends, so far as they will extend, in discharge of our several proportions

of the expense to which the said Messrs. *Sheppard & Sons* may become liable to pay as aforesaid."

In *Michaelmas* Term, 1833, the defendants commenced an action against the plaintiffs in the *Common Pleas*, to recover the balance due to them; and ultimately obtained a verdict for the amount, with interest on such part as consisted of bills bearing interest. In *Michaelmas* Term last, the plaintiffs moved for a new trial, but the Court refused to grant a rule.

The plaintiffs then filed their bill, praying that it may be declared that the defendants are not entitled to proceed in their said action against the plaintiffs, or to sue out execution upon the judgment obtained by them against the plaintiffs; and that the defendants may be restrained by injunction from proceeding in the said action, and from commencing and prosecuting any other action in respect of the said debt alleged to be due to them from the plaintiffs; and that all necessary directions may be given for effectuating the said several purposes, and for general relief.

The case made by the bill, in reference to the connexion between *Hulme* and the plaintiffs, was this:—That *Hulme* was originally the shopman of one *Rowlands*; that *Rowlands* having become bankrupt, the plaintiffs took the premises which had been occupied by him, and continued the trade there, and employed *Hulme* upon the premises as their agent, with a salary of 120*l.* a year; that it was agreed in writing, that *Hulme* should have the option at any future period of taking that business upon himself, provided he relinquished his salary and paid the plaintiffs for the fixtures, &c.; that in *January*, 1830, *Hulme* took the business on his sole account, and that some time afterwards, a written agreement was entered into between him and the plaintiffs, by which he agreed to relinquish all claim to salary from *July*, 1829, and to pay for fixtures, &c.; that the fact of *Hulme* being the sole owner of the

1835.

TAYLOR
v.
SHEPPARD.

1835.

TAYLOR
v.
SHEPPARD.

business was universally known, as well as the circumstances under which he took it.

The bill charged, that if the plaintiffs were at any time liable at law for any debts contracted by the said *William Hulme*, under the said firm of *William Hulme & Company*, which the plaintiffs by no means admitted or acknowledged, but on the contrary utterly denied, the defendants must be considered to have elected to proceed against the said *William Hulme* for the balance alleged to be due to them in respect of the dealings and transactions between them and the said *William Hulme*, they having after full knowledge or notice of such alleged liability on the part of the plaintiffs issued the aforesaid *fiat*, and acted thereunder as before mentioned; and that they had thereby released the plaintiffs from their liability (in case they ever were liable to them). And as evidence thereof, the plaintiffs charged, that, since the trial of the said action, the plaintiffs had discovered, as the fact was, that pending the prosecution of the said *fiat*, and before the defendants had proved their said debt thereunder, or had received their dividend, or had signed the certificate of conformity of the said *William Hulme*, the said *William Hulme*, in the presence and hearing of the said defendants or one of them, deposed or stated, though contrary to the fact, that the said business so carried on by him under the firm of *William Hulme & Co.*, belonged to the plaintiffs, or that the plaintiffs had some interest therein up to the month of *October*, 1832.

The bill also charged, that notwithstanding such notice of the plaintiffs' alleged liability, the defendants continued to work the said *fiat*, and proved their debt against the estate of the said *William Hulme*, and received a dividend from the said *William Hulme's* estate, and also signed his certificate of conformity, before they commenced the said action against the plaintiffs.

1835.

TAYLOR
v.
SHEPPARD.

The defendants, by their answer, stated various difficulties which they had met with, in obtaining payment from *Hulme* in the course of these transactions; that *Hulme*, however, had on one occasion represented to them, that he was backed by a great *Manchester* house; and that, on another occasion, the defendants having arrested *Hulme* for the amount of a dishonoured bill, he introduced to one of the defendants the plaintiff *Gibson*, who said that the plaintiffs would guarantee *Hulme* to any firm, to any reasonable amount; that, under these circumstances, the defendants continued their dealings with *Hulme*.

The defendants then stated, that it appeared by the examination of *Hulme*, and the proceedings under the fiat, and they believed the fact to be, that the said firm of Messrs. *Hulme & Co.* was established some time in the year 1829 by the said plaintiffs; and that the same, and all the fixtures, stock in trade, and every thing in the said house for carrying on the same, belonged to the said plaintiffs; and that the said *William Hulme* was then only agent or manager of the said plaintiffs, at a salary of 120*l. per annum* or thereabouts, under a certain agreement, bearing date on or about the 28th *July*, 1829, and which was reduced into writing, and signed by the said plaintiffs and the said *William Hulme*, and which is set forth in the said bill of complaint; and that they supplied the said *William Hulme* with woollen manufactured goods for the purposes of sale; and that the said *William Hulme* was to exercise his discretion in making a profit thereof, and was to account for the same regularly to the said plaintiffs; and that the same so continued down to the 2nd *October*, 1832, and subsequent to the date of the said act of bankruptcy.

The defendants further stated, that they first became acquainted with the connexion between the plaintiffs and *Hulme*, and of their employment of *Hulme* as their agent, by the examinations of the plaintiffs, the bankrupt, and

1835.

TAYLOR
v.
SHEPPARD.

others, under the proceedings in the bankruptcy; and not till the conclusion of those proceedings. They denied having received any dividend on their debt, and stated that the proof had been expunged from the proceedings. They also stated, that they were unable to set forth as to their knowledge or information, but they said they did not believe it to be true, that, since the trial of the said action, the plaintiffs or any of them had made the discovery alleged by the bill.

An injunction having issued to stay proceedings at law, and an order *nisi* having been obtained to dissolve it—

Mr. *Simpkinson*, and Mr. *Kenyon Parker*, now shewed cause against dissolving the injunction.—The defendants have elected to make *Hulme* their sole debtor. It is immaterial whether they knew of his agency or not at the time of issuing the fiat. If they pursued their proceedings against *Hulme* and signed his certificate, with the knowledge of his dealing with the plaintiffs, they by that act abandoned their claims as against the plaintiffs: *Ex parte Husband* (a). [*Alderson*, B.—If they prove under the fiat against one partner, what is there to prevent them from going against the solvent partners? The case you set up makes *Hulme* liable; but you also are liable. Their discovering that *Hulme* is only a name, and that there are real persons behind, does not of course relieve *Hulme* of his responsibility, if he previously held himself out to the world as a partner: but you may be equally liable.] *Hulme* was a mere agent, and not a partner; and they elected to treat him as the debtor, and not the principals. That is shewn by the agreement to prosecute the plaintiffs. Under that there was a distinct appropriation of the dividends, which is equivalent to receiving them. They say

(a) 5 Madd. 418.

that the proof was expunged, which is not the case. They say also, that they waive their right to dividends, which they cannot do behind the back of third persons. [*Alderson, B.*—The agreement to prosecute seems only to be a sort of guarantie to the attorney. The question is, whether the defendants knew *Hulme* to be the agent of the plaintiffs at the time they gave credit to him. Then another question is, whether, after a trial has been had, that is a proper subject for the interference of a Court of equity? There is a class of cases where a party recovers at law, and afterwards the party losing finds a receipt which he might have used at the trial. It is universal at law to give no new trial in such a case.] The refusal of a new trial at law entitles the plaintiffs to apply to a Court of equity for relief. The introduction of a new trial at law is comparatively of modern origin. It was introduced about the year 1700. There are many authorities to shew, that a Court of equity may interfere in such a case: *Sewell v. Freeston* (a), *Kent v. Bridgman* (b), *Blackhall v. Combs* (c), *Countess of Gainsborough v. Gifford* (d), in which the Master of the Rolls refers to the case of finding a receipt after the trial; *Robinson v. Bell* (e), *Hankey v. Vernon* (f), *Farquharson v. Pitcher* (g). [*Alderson, B.*—In *Farquharson v. Pitcher*, it appears that the Court of law having jurisdiction refused to exercise it. They determined nothing at all. Here the matter is *res judicata*. In *Hankey v. Vernon*, the Court refused a new trial: but there the fact was admitted by the answer.] We say the discovery was made after verdict, and they do not displace this statement by their answer. To say the least of it, they leave it in doubt by their answer, whether we made the discovery before or since the trial.

1835.

TAYLOR
v.
SHEPPARD.

(a) Ch. Ca. 65.

(b) Prec. Ch. 283.

(c) 2 P. W. 70.

(d) 2 P. W. 424.

(e) 2 Vern. 146.

(f) 2 Cox, 12.

(g) 2 Russ. 81.

1835.

TAYLOR
v.
SHEPPARD.

Mr. *Temple*, and Mr. *John Romilly*, *contrà*.—The plaintiffs could make no affidavit to enable them to obtain a new trial. They therefore come here, where they are not called upon to make an affidavit. Under the circumstances, the defendants had a right to proceed against *Hulme*. Is the proceeding against *Hulme* in ignorance that other parties were concerned, a bar to proceeding against the other parties when discovered? The debt was proved on the 6th of *November*, and the proceedings under the bankruptcy continued till the 30th; and the defendants swear they were not until the close of those proceedings acquainted with the fact of *Hulme's* agency. Is the mere proof of the debt to be sufficient to raise the question of election? In *Ex parte Husband* (a), it is said, that the receipt of dividends is the criterion. In all other respects, that case is no authority for the present; the question there being merely between two different sets of creditors.

Then as to the question of jurisdiction, no doubt there are cases where this Court will interfere after verdict; but the Court looks to those cases with great anxiety. In *Sewell v. Freeston* (b), the Court refused to interfere. *Gainsborough v. Gifford* (c) does not meet the present question, and the doctrine of the Master of the Rolls in that case is commented upon by Lord *Eldon* in *Protheroe v. Forman* (d). *Hankey v. Vernon* (e) turns on this—that there must be an express discovery. [*Alderson*, B. —A discovery which the plaintiff could not obtain except in equity. Here the plaintiffs might have obtained the discovery by the examination of witnesses at law. *Hulme* was examined as a witness at the trial.] Admitting all that the plaintiffs say to be true, it amounts only

(a) 5 Madd, 418.

(b) Ch. Ca. 65.

(c) 2 P. W. 424.

(d) 2 Swanst. 227.

(e) 2 Cox, 12.

to this—that they have discovered evidence which they might have produced at law; and which, if they had so produced, might have obtained for them a different verdict. The principle is very clearly laid down by Lord *Redesdale* in *Bateman v. Willoe* (a): “It is said,” he observes, “that great injustice has been done to the plaintiffs. Supposing that to be the case, it is not sufficient to shew that injustice has been done, but that it has been done under circumstances which authorize the Court to interfere; because, if a matter has already been investigated in a Court of justice according to the common and ordinary rules of investigation, a Court of equity cannot take on itself to enter into it again.” *Whitmore v. Thornton* (b), and *Field v. Beaumont* (c), are also authorities in point.

Another circumstance is, that the bill prays no specific relief. It prays, without stating why, a declaration that the defendants are not entitled to proceed against the plaintiffs, and for an injunction to restrain them from so doing. But it asks for no relief consequent on the injunction.

ALDERSON, B.—The injunction must be dissolved. I do not see my way clearly to the proposition, that the party, under the circumstances, is to be taken to have made his election. It seems clear to me, that if, at the time of issuing the fiat, the defendants in equity had known the facts, they might have brought actions against *Hulme* and the present plaintiffs; possibly, a joint action against both. All they knew, however, was, that *Hulme* was the ostensible person:—who were the real persons, they did not know. It turned out upon the inquiry under the fiat, that they had reason to believe that *Hulme* was only an agent, and that the plaintiffs were the real persons concerned in the transaction, and liable to the debts of the concern. At the conclusion of the transac-

1835.
TAYLOR
v.
SHEPPARD.

(a) 1 Sch. & Lef. 201. (b) 3 Price. 241. (c) 1 Swanst. 209.

1835.

TAYLOR
v.
SHEPPARD.

tions in the bankruptcy, they came to the opinion that they had a substantial case against the plaintiffs in equity. The only fact which can be urged as a ground of election, is their afterwards signing the certificate; but at that time they did not know the manner in which all the circumstances might strike a judge or jury. It is obvious, for instance, that they could not tell what effect the agreement by the plaintiffs for the disposal of the property to *Hulme* might have on the minds of the jury. Therefore, at all events, these circumstances, which the plaintiffs attempt to set up in order to raise a case of election, tend clearly to exonerate the defendants. Then the question is, whether it is a reasonable conclusion from the facts—considering too that *Hulme* and his agents were examined at the trial, and that the plaintiffs gave notice to produce the agreement entered into by the defendants, and that no question was ever put to *Hulme* or the other persons on the point in question—whether it is a reasonable conclusion, that *Hulme* told the state of these transactions to the defendants in the manner charged in the bill? I cannot think the parties have placed themselves in a situation which entitles them to keep up this injunction. *Hankey v. Vernon* is a strong case; but there the plaintiff could not prove the fact by any witness which he could have examined at law. Here the fact might have been proved by examination of the witness at law.

Injunction dissolved.

Feb. 9th.

Where a document is in the custody of an officer of a

Court of equity,

the Court will, on grounds of public policy, order the production of that document at the trial of an indictment against any individual, whether he be a party to the suit in which the document is in evidence, or not.

IN this cause the plaintiffs having indicted *William Hulme* for perjury, committed on the trial of the action

before mentioned, and alleging also that they were about to prefer bills of indictment against the defendants (though for what offence did not appear), a motion was made on behalf of the plaintiffs, that certain books, papers, and documents, which had been left by the defendants in the custody of Mr. *Bowyer*, their clerk in court, under an order in this cause, might be produced by him at the trial of *William Hulme*, and also before the grand jury before whom the bills of indictment against the defendants might be laid, and also upon the trial of those indictments, should true bills be found.

The affidavit of the plaintiffs' solicitor, stated his belief of the materiality of those documents at such impending trial or trials.

Mr. *Simpkinson*, for the motion.

Mr. *John Romilly*, *contrà*.—*First*, the plaintiffs are not entitled to this motion as against *Hulme*. In *Ex parte Jones* (a), where papers had been deposited with the solicitor of the bankrupt, the Vice Chancellor would not permit them to be delivered to the assignees for the purpose of founding criminal proceedings against the bankrupt. In the present case, there is no proof how the papers got into the hands of the defendants, and *Hulme* might object that they got them from his solicitor. [The *Lord Chief Baron*.—There is no such protection in criminal cases.] A third party will surely be protected. *Hulme* is not a party to this suit. If this motion be granted, the consequence will be, that a bill of discovery may be filed in this Court for the purpose of obtaining evidence to charge a person criminally, who is not a party to the proceedings in this Court. It would be monstrous to hold that a Court of equity could be used for such purposes. The plaintiffs are entitled to the books and papers for every thing relating

1835.
TAYLOR
&
SHEPPARD.

(a) Buck, 337.

1835.

TAYLOR
v.
SHEPPARD.

to this suit, but not as against a third party: *Rex v. Dixon* (a). *Secondly*, it is clear that the motion must be dismissed as to the defendants. The Court will not compel parties to produce evidence to support an indictment against them. Besides, the notice of motion does not state for what offence they are to be indicted, and is in other respects loose and unintelligible.

The LORD CHIEF BARON.—I go along with you on the last point: as to that, the motion must be refused. But upon the first point, I think the plaintiffs are entitled. The cases which have been cited have no application. They depend on the question, whether an attorney can be compelled to deliver up papers of his client which are in his custody; and it has always been held that he cannot. The late Lord *Tenterden* departed from the old rule on this subject to a very considerable degree (b). I do not say, however, whether my opinion would agree with his to the extent to which he carried it. That case in *Burrow* is, no doubt, sound law; but I have also heard Lord *Tenterden* say, that, in criminal cases, the rule does not apply. The principle of that case is, that where a person is acting as an attorney *bonâ fide*, the Court considers the attorney and the party himself as the same party. The case in *Buck* is to the same effect. There the documents were held by the attorney of the bankrupt, the attorney having received them for the purpose of defending several actions which had been brought against the bankrupt by certain underwriters; and the question was not, whether the Court would order the documents in its own possession to be produced, but whether it would compel the production of those which were in the posses-

(a) 3 Burr. 1687.

(b) See *Williams v. Mundie*, Ry. & Mood. 34. But the old rule is restored. *Doc d. Shellard v. Harris*, 5 C. & P. 592; *Moore v. Ter-*

rell, 4 B. & Ad. 870; 1 Nev. & Man. 559. The cases on the subject are reviewed by Lord *Brougham* in *Greenough v. Gaskell*, 1 Mylne & K. 100.

sion of the bankrupt. The Court said, we have no jurisdiction to do this; we cannot violate the confidence between the bankrupt and his solicitor. That is not so here. It appears, that there was a letter in the possession of the defendants, which was supposed to be essential as evidence to convict this man of perjury. What benefit is it to the defendants to retain it? They have no interest in protecting a man who is guilty of perjury. What Court will lend itself either to conceal or withdraw evidence, which is to convict a man of so great a crime? If the original of this letter is not forthcoming at the trial, a copy of it cannot be given in evidence; and is it equitable to give the party a chance of escape by keeping back the original document? A document gets into the possession of the Court in a thousand cases; and the discovery of the document leads to the discovery of the offender. These are not documents created by the cause: they existed before the suit commenced. They have found their way into this Court; and the defendants do not in fact possess them. It is asked that they may be returned to the defendants; but if they were so returned, might not the defendants withdraw them from the hands of justice? If they might be subpoenaed to produce them, why may not also their clerk in court? Suppose some great felony or murder had been committed, would there be any difficulty in such a case?

It is said, that to grant this motion would tend to the abuse of Courts of equity. Certainly there are cases in which it would be an abuse. But suppose a bill of discovery to be filed, and it turns out that, amongst the documents produced, there is one—a forged will, for instance—in which the defendants have no interest, but by which the interest of third persons is deeply affected, and this document gets into the possession of a clerk in court—on what foundation could the defendants say that such a document ought not to be produced, but that it ought to be returned to them, in order that they might put it in the fire? Upon a trial at common law, if a forged document

1835.

TAYLOR
v.
SHEPPARD.

1835.

TAYLOR
v.
SHEPPARD.

appears in evidence, the Court will impound it (*a*); why then, if the same principle be acted upon, should a Court of equity suppress these proceedings (*b*)?

Feb. 19th.

Where there are several actions against the same party grounded on the same document, and the document is in the custody of an

officer of a Court of equity, in a suit instituted by the defendant at law to restrain proceedings in one of the actions, the Court, upon the application of the defendant at law, will order the production of that document at the trial of another of the actions, though the plaintiff in the latter action is not a party to the suit in equity.

ON this day it was moved, that the before-mentioned books, papers, and documents, (which included the agreement stated *ante*, p. 272) might be produced by Mr. Bowyer at the trial of an action, which had been commenced

(*a*) *Fitch v. Wells*, 1 Salk. 215; Holt. 213; Co. Litt. 231. b. note (1); *Rex v. Clifford*, 1 Car. & P. 521. And in equity, see *Frankland v. Hampden*, 2 Vern. 66.

(*b*) On the day on which the next motion was argued, his Lordship said, that he had inquired as to the practice of the Court of Chancery in cases where the plaintiff in a suit applies for the use of documents admitted by the defendant, in order to furnish evidence for the indictment of a third person, not a party to the suit; and that the opinion of the registrars was unanimous that an order for the production of papers in such a case might be made, though they could find no express authority in point. The reporters have been furnished by one of the officers of the Court of Exchequer with the following cases, which were sent by the registrars of the Court of Chancery to the Lord

Chief Baron as bearing upon the point in question—

Vaux v. Mackenzie.—11th December, 1806, B. 48.—On the application of the plaintiffs, the defendants' answer to be produced at the trial of action brought by P. C. Bruce (no party) against the defendants.

Robson v. Moore.—5th June, 1813, B. 782.—On the application of a third person, the clerk in court to attend with the record of the bill and answer of the defendant, indicted for perjury alleged in the answer of the defendant.

Lloyd v. Sandilands.—27th November, 1822, B. 7.—On the application of a person no party, a person to be appointed by the Master to attend the grand jury on an indictment preferred against the plaintiff for perjury, with affidavits sworn by the plaintiff; and if bill found, to attend the trial.

by *Rawson & Co.*, against the plaintiffs, to recover the sum of 290*l.* 11*s.* 6*d.* *Rawson & Co.* were amongst the creditors of *Hulme*, who, in common with Messrs. *Sheppard*, the present defendants, had signed the above-mentioned agreement. Their action, therefore, and that of the present defendants, had been brought under precisely similar circumstances.

1835.
 TAYLOR
 v.
 SHEPPARD.

Mr. *Simpkinson* for the motion.

Mr. *John Romilly*, *contrà*.—This is not a case where public justice is concerned. The papers not being required for any indictment, the plaintiffs are not entitled. They seek evidence in this suit against persons who are not parties to this suit, who do not appear to this motion, and who cannot make their defence. You can only move against a party upon his answer; not in his absence: *Marsh v. Sibbald* (a). If this motion be granted, it will be a stronger step than allowing the answer of one defendant to be read against another. [The *Lord Chief Baron*.—This is a distinct collateral motion. They have found a certain document in the possession of the defendants' clerk in court, and they desire that it may be produced by that officer. Suppose, that by a bill of discovery a party was bound to produce a book, which, when in the hands of an officer of the Court, is found to affect various of his Majesty's subjects:—do you mean to say, that when it is in the possession of this Court, all access to it is locked up? The production of this paper will not alone make it evidence: they must prove it by witnesses. If your client had a book relating to a public company, he might be ordered to produce the book as part of his answer; and then any person having an interest in it, might move to have it produced at law; proving it sufficiently.] Not unless he was

(a) 2 Ves. & B. 375.

1835.

TAYLOR
v.
SHEPPARD.

a party to the suit. The papers are only left with the clerk in court for the purposes of a particular suit. The plaintiffs must be left to their remedy by a *subpoena duces tecum*. Your Lordship cannot order the production of these papers without shaking that case before Lord *Eldon*, and opening a new branch of equity; which may have a very serious effect.

Mr. *Simpkinson* in reply.—In *Marsh v. Sibbald*, it was sought to compel the defendant to produce a document. Here it is in the possession of the Court. The Court will not impound the document to the hindrance of all justice.

The LORD CHIEF BARON.—I should be sorry to be so rash and presumptuous as to seek to overturn any decision of Lord *Eldon*. No one has a greater respect than I have for that learned Lord—a respect not formed on any recent acquaintance, but on that of a whole life. As far as I understand that case, the decision is this:—that he could not order the answer, or that which constituted part of the answer, of one defendant to be read against another, upon a trial at law brought by that other defendant. I may take the precaution of stating thus much, in order that the present case may not be drawn into a precedent upon all occasions.

I think it will be seen that the public inconvenience which is expected to arise from one way of deciding this question, would result equally from the other. It is said, that if the motion be granted, it will give rise to a new species of equity, in order to get at evidence in certain cases. It may be so; but I do not know that a Court of equity is bound by any decision to limit its power as to enforcing the production of documents. Look at the state of the case. Several traders enter into an agreement, which is signed by them in common, and which states, that having prosecuted a commission against a certain in-

1835.

TAYLOR
v.
SHEPPARD.

dividual, and having made a discovery from that individual as to other persons, they agree to make use of the dividends as a common fund, to enable them to render the other parties liable. This agreement is known amongst themselves only, and they put it in force by bringing an action in the name of one of themselves against the present plaintiffs, and a verdict is found against them. It is supposed that that verdict is incapable of being disturbed; but the present plaintiffs file their bill in equity, and they find this agreement signed by twenty or thirty persons, all having the same interest in it as the person who by chance has it in his possession. Assume that it is a good defence at law; it is now in this Court; the other parties have brought their actions; and the plaintiffs in equity now seek the benefit of that agreement, which was accidentally discovered upon a bill filed against the party who brought the first action. It is said, that this Court has no jurisdiction to order the production of the agreement as against the other plaintiffs at law, and that each of those nineteen plaintiffs may go on and recover the same verdict, and that the defendants at law have no remedy. Would not that be calling on this Court to shut out important evidence, and to dispose of the rights of individuals contrary to law? But it is said, you may return it, and then compel its production by a *subpœna duces tecum*. Now we know that when a document is in the possession of the plaintiff, it is in his discretion whether he shall produce it or not, upon notice, and the defendant may resort to other evidence if it be not produced; but if the party who has it, is only a witness, and refuses to produce it, you cannot give a copy in evidence. The counsel for *Sheppard* who has produced the document, presses me not to part with it; which consequently leads me to believe that he would not produce it on a *subpœna duces tecum*. *Sheppard* would not hand it over to any of the other parties; on the contrary, he would be careful not to do

1835.
 TAYLOR
 v.
 SHEPPARD.

so; and yet I am asked to lend myself to suppress a document which might never have come to light at all, but for a bill of discovery.

In this case, the plaintiffs in the different suits have a common interest. The document derives no authority in consequence of coming from this Court. It must be proved by a witness at law; and the party who objects to its production, may object before the judge at law. But suppose it were the case of a public company, and the clerk objected to producing it in Court, on the ground that it contained the titles of different persons—I confess, I should not think that, while impounded here, it would be so inaccessible that no man living should be allowed to produce it. Agreeing, therefore, entirely with the rule, that you cannot read the answer of one defendant against another in the same cause, I do not see that I should do justice, if I refused the party the benefit of this paper in evidence.

Motion granted.



March 3rd.

D'ALMAINE and Another v. BOOSEY.

To publish, in the form of quadrilles and waltzes, the airs of an opera of which there exists an exclusive copyright, is an act of piracy.

The *English* assignee of the copyright of a foreign musical composer is within the protection of the statutes relating to copyright.

DENIS FERDINAND ESPRIT AUBER, of *Paris*, in the early part of the year 1834, wrote and composed a certain book comprising the music of an opera called *Lestocq*, which was first represented at *Paris* on or about the 24th of *May* in the same year.

By an indenture, dated in *June* in the same year, stamped according to the laws of *England*, and made between *Auber* of the one part and the plaintiffs of the other part: *Auber*, in consideration of 80*l.* paid to him

Semble, that a foreigner who resides and publishes in *England*, is within the like protection.

1835.

D'ALMAINE
v.
BOOSEY.

by the plaintiffs, assigned to the plaintiffs, their executors, administrators, and assigns, all his copyright in the before-mentioned book, and the several airs, pieces, or compositions comprising the music thereof, and the sole and exclusive right of printing, re-printing, and publishing the same and every part thereof; saving and reserving to *Auber* and his assigns the right and privilege of printing, publishing, and vending, after the first publication thereof by the plaintiffs (such first publication not being delayed beyond the 15th of *July* then next), copies of the said book, and the airs or compositions comprising the same, in *France* and *Germany*, or elsewhere, not being any part or parts of the united kingdom of *Great Britain* and *Ireland*, or any of the colonies or dominions thereof.

About the 12th of *June*, 1834, the plaintiffs, who carry on business in co-partnership as music sellers, gave notice in writing to persons connected with that trade, and, amongst others, to the defendant, that they had purchased the copyright in the music of *Lestocq*. On the 16th of *June* they caused the book, comprising the music of the whole opera, to be entered at Stationers' Hall. On the 30th of *June* a like entry was made of the overture; and on the 23rd of *July* a like entry was made of the airs. The overture was published by the plaintiffs at their shop on the 30th of *June*, and the airs on or about the 23rd of *July*. In *August*, the plaintiffs published two sets of quadrilles, arranged by *Wheippert*, from the same opera.

In the early part of the year 1835, the plaintiffs discovered that the defendant had published several of the airs of *Lestocq*, with some alterations, in the shape of quadrilles and waltzes. These publications were respectively called *Musard's 57th Set of Quadrilles (New Series)*: *Musard's 58th Set of Quadrilles (New Series)*, and *Musard's 42nd Set of Waltzes*. They were all described on the title page as having been taken from *Auber's* opera of *Lestocq*, though arranged by *Musard*.

1835.

D'ALMAINE

v.

BOOSEY.

The plaintiffs having filed their bill against the defendant, praying for an account of these several publications and of the profits arising from the sale thereof, and for an injunction to restrain the further sale—A motion was now made for the injunction.

In support of the plaintiffs' case, the affidavit of Mr. *Rodwell*, an experienced musician, was read. With reference to the 57th set of quadrilles published by the defendant, he deposed that the second quadrille was so completely similar to an air of the opera called "*Gentile Muscovite*," that it was nearly note for note the same, even to the accompaniments; that the melody of the fourth quadrille was like another air of the opera, with some variations in certain bars, which he specified; and that the melody of the fifth quadrille was contained in certain bars of the overture, which he specified. With reference to the 58th set, he said that the first quadrille was founded on, though much varied from, an air of the opera called "*Le pauvre Ivan*." He mentioned the several bars in which alterations had been made, and stated that in one instance there had been a change of key. He made similar statements with respect to the other quadrilles and the waltzes; observing, however, that in one of the waltzes there were sixteen bars which were not in the original air. He concluded his affidavit by saying, that although in several instances the music of the quadrilles in question was slightly varied from the airs of the opera, yet such variation was not more than is always found to be necessary when the music of an opera is arranged in the form of quadrilles.

The defendant, by his affidavit, stated that in *December*, 1833, an agreement was entered into between him and *Philippe Musard*, a *French* subject residing at *Paris*, that the latter should supply the defendant annually with a stated number of quadrilles, waltzes, and galoppes, composed or arranged by him for the piano and orchestra, so

as to suit the *London* season. That the defendant had no control over *Musard* as to the subjects to be chosen, or the authors upon whose compositions such quadrilles &c. should be founded; and that he did not know on what the same were founded until they were received by him from *Musard*; that the quadrilles and waltzes in question were received by the defendant from *Musard* in pursuance of the foregoing agreement; and that the former were published by the defendant in *November*, 1834.

The defendant further stated, that the overture to the opera of *Lestocq*, as entered by the plaintiffs at Stationers' Hall on the 30th of *June*, is an abridgment, arrangement, or adaptation of the overture as composed by *Auber*; and that it is so altered, abridged, arranged, and adapted as to be performed on the piano forte by one person; and that it is an entirely distinct work from the overture of *Auber*; which last-mentioned composition can only be performed by the united efforts of a number of persons performing on different instruments. That the defendant's belief is, that the overture so entered was not composed or arranged by *Auber* in the mode or form in which it was so published and entered by the plaintiffs, but that it was so composed and arranged by some other person. That the airs which were entered by the plaintiffs on the 23rd of *July*, were in like manner adapted for the piano forte only. That the defendant's reason for believing that the overture and airs had been arranged by other persons was, that the plaintiffs had entered and published several other airs from *Lestocq* which had been arranged by *Adam*, *Kalkbrenner*, and others.

The defendant further stated, that *Auber* composed only the music of the said opera in the form usually called and known as the score, which contains the whole of the music to be used by all the performers collectively with their several instruments. That it is universally known in the musical profession, and the fact is, that the

1835.

D'ALMAINE
v.
BOOSEY.

1835.

D'ALMAINE

BOOTH.

opera *Lestocq*, as entered on the 16th of *June*, is the only one of the compositions before mentioned which was composed by *Auber* himself; and that the several other compositions are only arrangements or adaptations, and were composed by other persons. That it is in the usual course of trade to call such compositions by the name of arrangements or adaptations; and that the persons who make or compose them, possess an inferior degree of talent to the original composer of the opera, who, from his superior talent, would not occupy his time or attention upon such a subject. That the value of such arrangements or adaptations depends entirely upon the talent or ability of the arranger or adapter. That the arrangements and adaptations published by the plaintiffs were not intended to be used for dancing; while, on the contrary, the defendant's publications were expressly intended for that purpose.

Upon this last point the defendant also relied on affidavits of two other musicians, who stated that the music of the plaintiffs' publications was adapted for the piano forte only, in which form it was not intended to be danced to, and that in fact, it had not those necessary breaks and portions of melody which are absolutely necessary to form a quadrille or waltz, whereas the object of the defendant's publications was the arrangement or adaptation of the music of *Lestocq*, so as to admit of the same being danced to, and that in such arrangement or adaptation a very considerable degree of musical skill and talent is necessary, and that the sale of the quadrilles and waltzes so formed, is very much increased or diminished according to the talent and ability of the composer or arranger of the same.

With respect to the time of the publication of the opera *Lestocq*, the evidence was contradictory. The plaintiff asserted that no part of the opera was published by *Auber* before the end of *July*, 1834, about which time it was registered at the proper office at *Paris*. The de-

fendant, on the contrary, asserted, that from letters which he had received to that effect, he believed the publication in *Paris* had been a month earlier than the 2nd of *July*.

1835.

D'ALMAINE
v.
BOOSEY.

Mr. *Twiss*, for the plaintiffs.—The defendant states, that under a previous agreement for that purpose he received the music in question from *Musard*, and that he had no control over *Musard* as to the selection which the latter might make. The fact is, however, that he has waited to see what would be most popular and attractive in the opera of *Lestocq*, and has pirated all the choicest airs accordingly. It will be said that a foreign author cannot convey his copyright to an *English* subject, so as to place the *Englishman* under the protection of the acts of Parliament. In *Clementi v. Walker* (a), it was held that a foreign author not using due diligence for that purpose, cannot stop the publication of his works in *England*; but the Court declined to decide the question whether the act of publishing abroad alone makes the work *publici juris*. It is apprehended, however, that it will not; and that the assignment to the plaintiffs is valid at common law, if not under the act of Parliament. Copyright exists at the common law, and the power to transfer such a right is recognised by the statute of *Anne* (b), which speaks of authors “who have not transferred to any other the copy or copies of their books.” Nothing has occurred in this case to narrow the author’s privilege at common law. But then it will be said that the 7th section of the statute provides that nothing contained in the act shall extend to prohibit the importation of any books in *Greek*, *Latin*, or any other foreign language printed beyond the seas. Now it can scarcely be argued that music is language within that clause of the statute; but even if it be so, it is clear that where an *Englishman* possesses himself of the right

(a) 2 B. & C. 861; 3 Dowl. & Ryl. 602.

(b) 8 Anne, c. 19.

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a very different footing." Now these observations are strong to shew that no copyright exists, except in a *British* subject. [The *Lord Chief Baron*.—Those observations were only made in answer to the arguments at the bar. Mr. Justice *Willes* avoids deciding the point.] At all events, it is not to be inferred that his opinion was in favour of any protection to foreigners. In *Clementi v. Walker* (a), Mr. Justice *Bayley* expresses himself with great caution on the subject, declining to give any opinion as to whether an author publishing abroad is entitled to any privilege here. It was unnecessary to decide the point in that case, but in *Delondre v. Shaw* (b) there is an express decision on the subject. In that case one of the grounds of the Vice Chancellor's judgment was, that a foreigner can have no copyright which a Court of equity will protect. [The *Lord Chief Baron*.—What has that case to do with copyright? The substantial ground for relief was, that the property of the plaintiff was injured by the sale of a spurious article by another party. Am I to understand that if a foreigner residing here were to invent and publish a work and enter it at Stationers' Hall, he would have no property in that work?] The present is not that case; but it is difficult to say that a foreigner so circumstanced would have any such property, for the object of the act was solely to encourage *British* skill and industry. In *Page v. Townsend* (c), it was held that prints engraved and struck off abroad, but published in *England*, are not entitled to protection from piracy. [The *Lord Chief Baron*.—That case depended upon the wording of a particular statute.] There is no case in which a Court of equity has ever interfered in favour of the copyright of a foreigner, and the assignment of such a right to an *Englishman* can make no difference.

But, *secondly*, supposing the plaintiffs to have a copyright in the work which they have purchased, there has

(a) 2 B. & C. 870; 3 Dowl. & Ryl. 602. (b) 2 Sim. 237.

(c) 5 Sim. 395.

1835.

D'ALMAINE
v.
BOOSEY.

1835.

D'ALMAINE
v.
BOOSEY.

been no piracy of it by the defendant. By an express provision in the deed of assignment, *Auber* was to have the right of publishing the opera abroad, after the first publication of it by the plaintiffs, upon condition that they published it in *England* before the 15th of *July*. They omitted to publish it within the prescribed period, and then the defendant purchased his work of *Musard* as adapted from the opera published by *Auber* at *Paris*. It is true that within the given time the plaintiffs entered the original opera as published by them at Stationers' Hall; but they have not in fact published it. The compositions which they have published are not *Auber's*, but those of various other persons. The overture which they have published is not the overture which was entered at Stationers' Hall, and the like observation applies to the other parts of the opera. Besides, even if they had published the genuine opera, the defendant's work is merely an adaptation of the original, and such an adaptation is not a piracy: *Gyles v. Wilcox* (a). [The *Lord Chief Baron*.—I think that if the original air is published, though with adaptations and harmonies, or for different instruments, it is a piracy, and an action will lie. This is not like the case of an abridgment of a book. The purpose of abridgments is very distinct from that of the works from which they are taken. No one can doubt that *Viner's Abridgment* and *Comyn's Digest* are original works.] According to the affidavits of disinterested witnesses of known talents, there is considerable exercise of mind in these adaptations, independently of what is derived from the original composition. Besides, the defendant's work does not pretend to compete with the elaborate work of the plaintiffs. Their publication is intended for the higher purposes of music, while that of the defendant is adapted entirely and exclusively for dancing.

Lastly, the plaintiffs must be left to their remedy at

(a) 2 Atk. 143.

law. The defendant has done no more than persons in his situation have usually done in the course of their trade; and in cases of this nature the custom of trade is to be regarded: *Dodsley v. Kinnersley* (a). At all events, a Court of equity will not interfere unless it is clearly and decidedly of opinion that the legal right is with the party complaining; if there be the least doubt on the subject, it will send the parties to law.

1835.

D'ALMAINE
v.
BOOSEY.

Mr. *Twiss*, in reply.—Admitting, what is by no means true, that a foreigner cannot sue in *England* for a breach of copyright, it does not follow that his assignee cannot do so. The assignee could sue, even though the assignor were an alien enemy. Suppose *Auber* having drawn a bill upon the defendant, had indorsed it to the plaintiff, and before it had become due a war had broken out between *France* and *England*; *Auber*, being an alien enemy, could not have sued the acceptor, but would it follow that the plaintiff could not have done so? yet his right would have been derived from an alien enemy. [The *Lord Chief Baron*.—One of the points raised by the defendant is this, that his work was purchased abroad, and, therefore, in effect taken from the publication abroad, and not from the publication here.] In order to bring himself within the saving clause of the statute, the defendant must shew that the work was *first* printed abroad. The 7th section of the statute of *Anne* must be read as if the word “first” were inserted before the words “printed beyond the seas.”

THE LORD CHIEF BARON.—Several nice points of law have been raised in the course of the argument; but when we refer to the facts of the case, it will be found to present no difficulty. I have been struck with the authorities

(a) Ambler, 403.

1835.

D'ALMAINE

v.
BOOSEY.

produced on behalf of the defendant, and if the Vice Chancellor had decided expressly that a foreigner, *quod foreigner*, had no protection in *England* in regard to copyright, I confess I should have doubted the correctness of that decision; though, certainly, I should not have decided in opposition to him, but should have put this case in the course of further investigation, out of respect to his authority. But the case which has been cited upon the subject does not go that length; it is in principle not quite intelligible, but there was clear ground for an injunction independently of the question of copyright. Besides, that was a case where one of the parties resided abroad. Now the acts give no protection to foreigners resident abroad in respect of works published abroad; and all the Vice Chancellor said was, that the publisher of a work at *Paris* could not protect himself in a Court of justice in *England*, either by action or injunction.

But the question, whether a foreigner publishing in *England* can sue in this country for a breach of his copyright, was in fact determined in the case of *Bach v. Longman* (a). *Bach* was a musical composer, who had come into this country from *Germany*. He sued *Longman* for pirating a sonata, which the latter had published in *England*, and was successful in his suit. The argument, however, in that case turned chiefly on a question which may properly be considered here; namely, whether music is within the statute of *Anne*. From the expressions of Lord *Mansfield*, it is clear that he considered printed music to be nothing more than a short-hand mode of representing what might be written in another manner at great length. In *Hime v. Dale* (b), this doctrine was doubted. I was for the plaintiff in that action, which was brought for an infraction of copyright, and I remember that Lord *Ellenborough* doubted, not only whether music

(a) Cowp. 623.

(b) 2 Camp. 27. n.

was within the provisions of the statute, but also whether music printed on a single sheet was a book. Having to investigate the subject for the purpose of moving for a new trial, I spent three or four days at Stationers' Hall in order to ascertain what entries were made under the act of Parliament, and I found, not only that short publications on single sheets of paper were entered as books, but also a great deal of music. There is no doubt, therefore, that printed music, in whatever form it may be published, is to be considered, in reference to proceedings of this nature, as a book.

Then how stands the case in relation to the acts of Parliament? The statute of *Anne* was one of the most laboriously considered acts that ever passed the legislature. It was the result of petitions of various booksellers, and afforded work to several committees, of which *Addison*, *Steele*, *Wortley*, and other literary men, were members. Now, the act provides, and they certainly intended, that *Latin*, *Greek*, and other works in a foreign language, printed abroad, might be imported for the purpose of sale in *England*. It might therefore be said that a *Latin* book published in *England* might be republished abroad, and then imported into *England*. That, however, was a *casus omissus* in that statute, and was accordingly remedied by the 12 *Geo.* 2, c. 36, which prevents the importation into this kingdom of books printed in this kingdom, and reprinted in any other country.

To apply these principles, if they may be called principles, to the facts of the present case. Early in 1834, the plaintiffs purchased the manuscript of the opera in question from *Auber*. At that time it was not published by any other person. The opera was indeed soon afterwards represented at *Paris*; but that was no publication. No work was at that time published abroad from which any other work of this nature might have been produced; and *Auber* being abroad, sells his very work to the plain-

1835.

D'ALMAINE
v.
BOOSEY.

1835.
 {
 D'ALMAINE
 v.
 BOOSEY.

tiffs. The plaintiffs, therefore, acquired a copyright in it before publication. They publish the work. After they have published it, comes out the publication of the defendant; the whole or part of which is alleged to have been copied from that of the plaintiffs. The defendant's case is, that he produced only what he had before purchased at *Paris*. But as the admitted fact is, that the plaintiffs made the first publication of the work in this country, the circumstance of its being republished at *Paris* afterwards does not justify the importation of it, because the 12 *Geo. 2*, c. 36, exactly meets that case. If, under such circumstances, the music be in fact republished in this country, the publication of it at *Paris* affords no protection to the defendant, and his argument drawn from that source falls entirely to the ground. The case, therefore, is that of a copyright vested in the plaintiffs of a work protected by the statute as well as the common law, and of a piracy committed in the publication of it afterwards by the defendant. The point whether the copyright of a foreigner is protected at all in this country, does not arise in the present case, because the plaintiff *D'Almaine* is not a foreigner. He could acquire the copyright of a publication as well from a foreigner as an *Englishman*. If he is the owner of the work, it makes no difference whether he composed it himself or bought it from a foreigner.

The other point raised by the defendant is this—whether his work, from its particular nature, is to be deemed a piracy. With reference to this question, the facts of the case are as follows:—The plaintiffs published, first the overture, and then a number of airs, and all the melodies. It is admitted that the defendant has published portions of the opera containing the melodious parts of it; that he has also published entire airs; and that in one of his waltzes he has introduced seventeen bars in succession, containing the whole of the original air,

although he adds fifteen other bars which are not to be found in it. Now it is said, that this is not a piracy, first, because the whole of each air has not been taken; and, secondly, because what the plaintiffs purchased was the entire opera; and the opera consists, not merely of certain airs and melodies, but of the whole score. But, in the first place, piracy may be of part of an air as well as of the whole; and, in the second place, admitting that the opera consists of the whole score, yet if the plaintiffs were entitled to the whole, *à fortiori* they were entitled to publish the melodies which form a part. Again, it is said, that the present publication is adapted for dancing only, and that some degree of art is needed for the purpose of so adapting it; and that but a small part of the merit belongs to the original composer. That is a nice question. It is a nice question, what shall be deemed such a modification of an original work as shall absorb the merit of the original in the new composition. No doubt such a modification may be allowed in some cases, as in that of an abridgment or a digest. Such publications are in their nature original. Their compiler intends to make of them a new use; not that which the author proposed to make. Digests are of great use to practical men, though not so, comparatively speaking, to students. The same may be said of an abridgment of any study; but it must be a *bond fide* abridgment, because if it contains many chapters of the original work, or such as made that work most saleable, the maker of the abridgment commits a piracy. Now it will be said that one author may treat the same subject very differently from another who wrote before him. That observation is true in many cases. A man may write upon morals in a manner quite distinct from that of others who preceded him; but the subject of music is to be regarded upon very different principles. It is the air or melody which is the invention of the author, and which may in such case be the subject

1835.

D'ALMAINE
v.
BOOSEY.

1835.

D'ALMAINE
v.
BOOSEY.

of piracy; and you commit a piracy if, by taking not a single bar but several, you incorporate in the new work that in which the whole meritorious part of the invention consists.

I remember in a case of copyright, at *nisi prius*, a question arising as to how many bars were necessary for the constitution of a subject or phrase. Sir *George Smart*, who was a witness in the case, said, that a mere bar did not constitute a phrase, though three or four bars might do so. Now it appears to me that if you take from the composition of an author all those bars consecutively which form the intire air or melody, without any material alteration, it is a piracy; though, on the other hand, you might take them, in a different order or broken by the intersection of others, like words, in such a manner as should not be a piracy. It must depend on whether the air taken is substantially the same with the original. Now the most unlettered in music can distinguish one song from another, and the mere adaptation of the air, either by changing it to a dance or by transferring it from one instrument to another, does not, even to common apprehensions, alter the original subject. The ear tells you that it is the same. The original air requires the aid of genius for its construction, but a mere mechanic in music can make the adaptation or accompaniment. Substantially, the piracy is, where the appropriated music, though adapted to a different purpose from that of the original, may still be recognised by the ear. The adding variations makes no difference in the principle.

I see no reason to direct the plaintiffs to go before a jury in a case in which there is no doubt. Certainly, if I had any doubt upon the subject, I should not think myself justified in disposing of this matter without sending it to a jury. It has been said, that the case is too unimportant to be so dealt with; but the same principles must be acted upon, whether the piracy consists merely in the

adaptation of opera music to quadrilles, or in extracting original airs from the finest operas of *Rossini* or *Mozart*.

Injunction granted.

1835.

D'ALMAINE
v.
BOOSEY.

WILLIAM HENRY WHITBREAD and Others v. THOMAS JORDAN and WILLIAM BOULNOIS the Younger;
and by Supplemental Bill,

WILLIAM HENRY WHITBREAD and Others v. EDWARD EDWARDS, STEPHEN PONTIN and ROBERT COLLINS.

1833.
Dec. 19, 20.
1834.
Feb. 17.
1835.
Feb. 12, 28.

THE original bill stated, that the plaintiffs had for many years carried on the business of brewers, in co-partnership, under the style or firm of *Whitbread & Co.* That in *November, 1827*, the defendant *Jordan*, being or pretending to be seised to him and his heirs, or well entitled, according to the custom of the manor of *Tottenham*, in the county of *Middlesex*, to a certain messuage and premises used by him as a public-house, called the "*Valiant Trooper*," and situate in *Goodge Street, Tottenham Court Road*, applied to the plaintiffs, and requested them to lend him the sum of 2000*l.* on the security of those premises. That it was thereupon agreed by the plaintiffs and *Jordan*, that the repayment of the said sum of 2000*l.* with interest should be secured by a deposit, to be made by *Jordan* with the plaintiffs, of all the title-deeds, copies of court roll, or muniments of title, relating to the said copyhold premises. That accordingly, on the 17th of *November*, the plaintiffs lent and advanced to *Jordan* the sum of 2000*l.*; and thereupon, in order to secure the re-

An equitable mortgage may be created of copyholds, by the mere deposit of the copy of court roll. It is therefore not sufficient for the protection of a purchaser or mortgagee of copyholds, that he should search the court rolls for incumbrances; he ought to require the vendor or mortgagor to produce an abstract of his title and the copy of his admission to the copyhold premises; and if the latter document is not forthcoming, its non-production must be reasonably accounted for.

Where the creditor of a publican in London took from the latter a legal mortgage of copyhold premises as a security for an antecedent debt, and, at the time of taking this security, knew that the publican was indebted to his brewers, and likewise was aware of the ordinary practice in London of publicans depositing their leases with their brewers by way of mortgage:—*Held*, that the creditor had such notice of the transactions between his debtor and the brewers, as would have put a prudent man on further inquiry; and that, having omitted to make such further inquiry, the equitable security of the brewers had priority over his legal security.

1835.
WHITBREAD
v.
JORDAN.

payment of the same with interest, *Jordan* deposited in the hands of the plaintiffs divers deeds and copies of admissions, being the title-deeds of the said copyhold hereditaments; and the same were accordingly retained by the plaintiffs as such security as aforesaid. That some time after such deposit had been made, it was discovered that the copy of the admission of *Jordan* himself to the premises had not been deposited by him with the other documents; and that thereupon *Jordan*, at the request of the plaintiffs, applied to the steward of the manor, and obtained from him a copy of his admission; which copy, *Jordan*, on or about the 28th *April*, 1828, delivered to the plaintiffs to be retained by them together with the other deeds and documents before mentioned, as such security as aforesaid. That 1750*l.* remained due to the plaintiffs on the aforesaid security.

The bill charged, that the defendant *Boulnois* claimed to be an incumbrancer upon the said premises, by virtue of certain conditional surrenders made to him by *Jordan* in *December* 1832, and *September* 1833; and that he combined with the defendant *Jordan* to defeat the plaintiffs' security and to deprive them of their lien; and that, for that purpose, the defendants had, without communicating with the plaintiffs, advertised the premises for sale by auction. That the plaintiffs immediately, upon being informed of this circumstance, gave notice to the defendant *Boulnois* and his solicitors of the priority of their claims; but that the premises had nevertheless been put up to auction and sold. That, previously to the year 1832, the defendant *Boulnois* had notice that *Jordan* was in embarrassed circumstances, and had parted with his title-deeds, &c. That, upon the occasion of the said conditional surrenders, the defendant *Boulnois* did not use due caution or diligence in inquiring into *Jordan's* title; and that no title-deed, copy of surrender, or admission, or other document relating to the premises, was in fact ever pro-

duced or shewn by *Jordan* to the defendant *Boulnois* or his solicitors. That it is the usual and ordinary practice for the proposed purchaser or mortgagee of copyhold premises to require from the vendor or mortgagor the production and inspection of the several copies of the surrenders or admissions to the said premises. That without this precaution the proposed purchase or mortgage cannot safely be completed; and that the party who does not take such precaution is guilty of gross negligence and want of caution, and abstains from doing so at his own risk, &c.

1835.
WHITBREAD
v.
JORDAN.

The bill prayed that an account might be taken of what was due from the defendant *Jordan* to the plaintiffs for principal and interest, by virtue of their security. That it might be declared that they were entitled to a prior charge on the said messuage and premises, and to be paid what should be found due to them, together with their costs of this suit, in the first instance and prior to the defendant *Boulnois*. That they might be paid out of the monies produced by the sale of the said premises. And that the defendants might be restrained from demanding or receiving the purchase-money or disposing thereof, and from conveying away the premises, &c.

After the filing of the bill, a fiat in bankruptcy was duly awarded and issued against *Jordan*, under which he was declared a bankrupt. He had, however, filed his answer, which was in substance the same as his evidence given in the cause; contradicting all the material allegations of the bill, as to the circumstances under which the security was given to the plaintiffs.


The defendant *Boulnois*, by his answer, stated, that previously to *December*, 1832, there had been various dealings in trade between him and *Jordan*; and that about the beginning of that month *Jordan* was indebted to him in the sum of 2000*l*. That *Jordan* at that time proposed to give a mortgage to the defendant of the premises in

1835.

WHITBREAD
v.
JORDAN.

question, which he stated to be copyhold; and that upon the defendant's expressing his ignorance of the nature of copyholds, *Jordan* explained it to him, and stated, that, it being copyhold property, he had power to mortgage it; and he referred the defendant to the steward of the manor for a confirmation of his statement. That the defendant thereupon asked *Jordan*, whether he had not mortgaged the premises to his brewers; to which *Jordan* replied, that not a penny was due upon the property; and that, for the money he had borrowed of the plaintiffs, who were his brewers, they had taken only his note of hand. That the defendant being anxious to use due care in taking the security, went with *Jordan* to the steward's office; when the steward's clerk inspected the court rolls of the manor, and, after such inspection, informed the defendant that the premises were perfectly unincumbered, and that *Jordan* was at perfect liberty to mortgage them. That, from what the steward's clerk stated of the nature of copyholds, the impression on the defendant's mind was, that no title-deeds of copyholds were at all necessary, but that the court rolls were sufficient. That in *December*, 1832, the defendant spoke to his solicitors on the subject, when they said it would be necessary that they should have an abstract of *Jordan's* title to the premises. That, on learning from *Jordan* that he had no abstract of title, but that he could obtain one from the steward, he called with *Jordan* on his solicitors, and told them, that though he wished them to be satisfied on the subject, still, if an abstract of title was not essentially required, he did not wish *Jordan* to be put to that expense. That he made the last observation not with any desire that a due investigation of the title should be avoided, but solely from a wish to save *Jordan* any unnecessary expense; more especially as it appeared to the defendant, who was not versed in legal matters, that the title must depend on the entries in the court rolls. That at a meeting, at which were present

the defendant, his solicitors, and *Jordan*, the solicitors asked *Jordan* for his copies of the court roll, and documents of title; and that *Jordan* said he had mislaid or lost them. The defendant then insisted that freehold and copyhold property do not stand on the same footing in regard to the furnishing of abstracts of title and to the production of title-deeds and copies of court rolls; that the production of the copies of court rolls does not make out evidence of title to copyhold property, but that the court rolls themselves must be examined; and therefore, that the loss of such copies does not in any degree affect the title; and that stewards are always willing to make out fresh copies. He admitted, that, prior to the surrender of 1832, he had reason to believe that *Jordan* was indebted to the plaintiffs; but he denied that he was aware, before the filing of the bill, that *Jordan* had given them the security therein mentioned, or had parted with his title-deeds. He admitted, that, except as stated in his answer, he had not compelled the production of the title-deeds of the premises.

1835.

 WHITBREAD
 v.
 JORDAN.

An injunction having been obtained *ex parte* according to the prayer of the bill, a motion was now made on the part of the defendant *Boulnois* to dissolve the injunction.

1833.
 Dec. 19, 20.

Mr. *Simpkinson* and Mr. *Chandless* for the motion.—The question is, whether, under the circumstances, the plaintiffs are entitled to the extraordinary relief which they seek. The plaintiffs do not pretend that the defendant *Boulnois* had any notice of their alleged lien, and they must therefore support their case by evidence of *crassa negligentia*. The defendant *Boulnois* searched the court rolls, and no incumbrance was entered upon them; and the only case the plaintiffs make against him is, that he ought to have insisted on *Jordan's* producing copies of the court rolls, documents which might be seen by examining the court rolls. The proposition the plaintiffs

1833.

WHITBREAD
v.
JORDAN.

must make out is, that they have a good equitable mortgage; and, having done so, that the omission to require the delivery of the copies of the court rolls from *Jordan* was such *crassa negligentia* as will justify the Court in postponing the defendant to the plaintiffs.

The first question is, whether an equitable mortgage can be created by a deposit of copies of court rolls. It was certainly held in *Ex parte Warner* (a), that a deposit of copies of court rolls was sufficient to give a lien on a copyhold estate; and this doctrine seems to have been approved in *Winter v. Lord Anson* (b): but, in a recent case before the Master of the Rolls, his Honour expressed a different opinion. A copyholder being in fact only a tenant at will to the lord of the manor, he has no right to make an equitable mortgage of his estate, nor has he any estate capable of being mortgaged. If he were able to do so, he would be enabled to commit a fraud on the lord. But supposing the rule to be the same with regard to copyholds as it is with respect to freeholds, it is necessary that the more important documents should be deposited. Now, in this case, the most important document—the admission of *Jordan* himself—was not deposited with the other title-deeds or until some months afterwards. In *Plumb v. Fluit* (c), title-deeds had been deposited as a security for money: a creditor of the mortgagor, fearing his insolvency, took a conveyance of the estate without notice of the incumbrance; and that conveyance was not only held good, but a bill by the mortgagee to obtain payment of the money due to him on the deposit, and to restrain the purchaser from proceeding at law to recover possession of the premises, was discharged with costs. In that case, Chief Baron *Eyre* distinctly states, that the circumstance, that the deeds are not forthcoming is not of itself notice of a deposit, but is only a circumstance of evidence to shew that there was reason for fur-


(a) 19 Ves. 202.

(b) 3 Rus. 488.

(c) 2 Anstr. 432.

ther inquiry; and that, unsupported by any other circumstances, it proves nothing. In the present case no such circumstances occur. *Plumb v. Fluitt* was cited in *Evans v. Bicknell* (a), and was not only not questioned by Sir Samuel Romilly, but spoken of with approbation by Lord Eldon. That was a much stronger case than the present; for there the property was freehold, and it was impossible to examine the title without the deeds; but, in copyhold property, as many copies of the court rolls may be obtained as the party chooses to pay for. In *Boxon v. Williams* (b), it was decided, that though a mere deposit of deeds constituted an equitable mortgage, yet it could only occur as against strangers in cases where the possession of the title-deeds could be accounted for in no other manner except from their having been deposited by way of equitable mortgage. In the present case, no necessity existed for inquiring who had the possession of the title-deeds, the rolls of the manor being the fullest evidence of the title.

Mr. Wigram, and Sir George Grey, *contrà*.—It is clear, from its being the only case on the subject, that the authority of *Ex parte Warner* has never been disputed. *Bicknell v. Evans* was a suit to charge a trustee personally, and appears to have been cited on the other side only to give weight to the case in *Anstruther*. The case in *Anstruther* is distinguishable from the present. That was a claim on the hearing of the cause upon evidence, and not on an interlocutory application. There was nothing further to be investigated, no inquiry was necessary. There it was in evidence, that the purchaser had asked for the deeds, and the vendor did not say that he had lost the deeds, but he promised to bring them on the following day. The question therefore was, whether, there was that absence of extreme circumspection which should have made the pur-

1833.

 WHITBREAD
 v.
 JORDAN.

(a) 6 Ves. 174.

(b) 3 Y. & J. 150.

1833.

WHITBREAD
v.
JORDAN.

chaser say, I will not pay my money until I see the deeds. In *Boxon v. Williams*, all that the Court in fact says is, that the possession of the solicitor is the possession of the client. The judgment in that case went on the ground, that the possession of the solicitor was the proper custody. All that that case decided was, that if the deeds are in the proper custody, there is no ground for making any inquiry respecting them. In *Jackson v. Roe* (a), the Court held, that a purchase for a valuable consideration without notice was no protection against an adverse claim of which the purchaser might have had notice, if he had used due diligence in investigating the title.

In *Hiern v. Mill* (b), Lord *Erskine* had to consider, whether an equitable mortgagee should be preferred to a purchaser with notice; and in that case he observed, “a purchaser must look to his (the vendor’s) title; and if, being asked for the deeds, he acknowledges he has not got them, the purchaser is bound to make further inquiry:” Admitting that as many office or official copies of the court rolls may be obtained as may be necessary, still there is only one stamped official copy delivered to the copyholder on his admission, and that, properly speaking, is the only title-deed of the copyholder. It is said by Sir *Edward Sugden*, that a purchaser of copyhold estates is furnished with an abstract of the surrenders and admissions, and requires copies of the material ones; but, in point of fact, the court rolls are scarcely ever searched by a purchaser; and it has always been understood in practice, that he is not bound by notice of their contents (c). It is stated in *Conventry’s Conveyancer’s Evidence* (d), “that the conveyancer treats the stamped copy granted on the completion of the purchase, as the only legitimate muniment of the copy-

(a) 2 Sim. & S. 472.

(b) 13 Ves. 114.

(c) Sugd. Vend. & P. 6th edit. 729.

(d) Page 158.

holder's title. That copy may be deposited in the hands of a creditor; and will, in the hands of that party, create a lien on the estate. Without production, therefore, of that document, or clear evidence of its loss or destruction, the title cannot be safely accepted." It distinctly appears, from *Boulnois's* inquiry of *Jordan* whether the brewers had any mortgage, that he had a knowledge of the general dealings between the parties. It is impossible to say, that *Boulnois* or his solicitor had not sufficient notice to induce them to make further inquiry.—*Martinez v. Cooper* (a), *Taylor v. Baker* (b), and *Horlock v. Priestley* (c), were also cited.

1833.
 WHITBREAD
 v.
 JORDAN.

Mr. *Simpkinson*, in reply.—It is not pretended, that we had any notice of the deposit; but it is contended, that we ought to have gone to the brewers or some other person, and inquired whether they had any security. None of the cases go upon the ground of the purchaser being a vigilant purchaser. If it were so, what becomes of the rule on a purchase for a valuable consideration without notice. If the argument be correct, the only vigilant purchaser will be a person conforming to the practice among conveyancers. A conveyancer, in investigating a title, would of course use very different vigilance from an ordinary purchaser. In a *bond fide* case unaccompanied by fraud, and without that notice which would put an ordinary purchaser on inquiry, there can be no pretext for saying that the purchaser would not prevail. And there was no ground in the present instance to put the party on inquiry. It is clear, from the Stamp Act, that every additional copy of the court rolls would be liable to the same stamp duty as the first.

The LORD CHIEF BARON (d).—I must consider this case

(a) 2 Russ. 198.

(b) 5 Price, 306.

(c) 2 Sim. 75.

(d) Lord *Lyndhurst*.

1834.
 WHITBREAD
 v.
 JORDAN.

before I decide it. The language of Chief Baron *Eyre* (a) is much stronger than I had thought it was, until I had read the case through. I should think an ordinary man would have exercised more caution than appears to have been used in the present case. The question is, whether there has been so much neglect as amounts to a wilful omission. I have not the least doubt, that a deposit of court rolls amounts to a good equitable mortgage, though the proposition at first startles; and I am quite sure, that no case has been decided contrary to *Ex parte Warner*.

1834.
 Feb. 17.

THE LORD CHIEF BARON (b), (after stating the facts in detail.)—An application was made by *Jordan* to *Boulnois* to allow this debt to increase, which *Boulnois* consented to on having security for the amount. He inquired of *Jordan* whether the house was incumbered; *Jordan* said it was not: the result was, that a mortgage was executed for 2500*l.* or 3000*l.* After a short period (about six or eight months afterwards), a second mortgage was executed of the same property, for securing the sum of 500*l.*; this was in *September*, 1833: shortly afterwards, either in *October* or *November* following, *Jordan* being embarrassed in his circumstances, a proposition is made to *Boulnois* for the sale of the house, to which he accedes; the house is accordingly advertised for sale by auction. That circumstance being known to Messrs. *Whitbread & Co.*, a correspondence takes place between their solicitor and *Jordan*. The house was sold to Mr. *Whisson*, who, in pursuance of the conditions of sale, paid a deposit in part of his purchase money. In this state of things, a bill is filed by *Whitbread & Co.* for an injunction to restrain the money from being paid over by the purchaser to *Boulnois*; and an injunction was granted for want of answer.

(a) In *Plumb v. Fluitt*.

(b) Lord *Lyndhurst*.

1834.
 WHITBREAD
 v.
 JORDAN.

The answer being subsequently filed, an application was made to dissolve the injunction. The question is, whether, under these circumstances, the Court ought in the present stage of the cause to dissolve the injunction. It has not been disputed, or at least it has not been disputed with effect, that an equitable mortgage may be created by a deposit of copies of court rolls. It is quite clear, that there may be an equitable mortgage of copyhold property. *Boulnois* did not act in this transaction on his own advice; he consulted Messrs. *Appleby & Charnock*. *Boulnois* inquired of *Jordan*, whether the brewers had any charge on the property: *Jordan* stated that the property was not charged, and referred to the steward of the manor. An application was made to the steward of the manor, and he stated that there was no charge on the property. But how is this to be understood? It must be understood to mean legal charge; because an equitable mortgage would not be known to the steward, as it would not be entered on the rolls of the manor. What are the other circumstances? It is known to *Boulnois*, that *Jordan* was indebted to Messrs. *Whitbread & Co.* for money advanced by them. He knew also, that some personal security, at least, had been given; for *Jordan* had stated that they were satisfied with his promissory note. With such information, I think any prudent man would have made inquiry of Messrs. *Whitbread & Co.*, whether they had any incumbrance on the property. But it does not rest here. *Jordan* was applied to for an abstract of his title: he said, I have none, but my title will be found on the rolls of the manor. Messrs. *Appleby & Charnock* then applied for the copies of the court rolls: he said he had mislaid them. This alone might not perhaps be sufficient; but taken in connection with the strong fact, that it was well known that *Jordan* was indebted to Messrs. *Whitbread & Co.*, it ought to have put *Boulnois* and his solicitors on inquiry.

It must be recollected, that I am not now deciding the

1835.
WHITBREAD
v.
JORDAN.

cause. It is sufficient for me at present to say, that, under the circumstances of this case, I think the injunction ought not to be dissolved.

1835.
Feb. 28th.

ON this day the cause came on for hearing.

In addition to what has been already stated, the bill charged, that, in *July* 1829, *Jordan* applied to the plaintiffs to lend the documents so deposited with them to Mr. *Phillips* his solicitor, for the purpose of being used at the trial of an action of ejectment; that accordingly the plaintiffs lent to Mr. *Phillips* the several documents, with the exception of the copy of *Jordan's* admission; that it was thereupon agreed that Mr. *Phillips* should hold the documents for the purposes aforesaid, as agent of the plaintiffs; and that Mr. *Phillips* then signed a paper purporting to be a receipt for the several documents, which were specified, and an undertaking to return them. The bill also charged that the copy of *Jordan's* admission was never in the hands of *Phillips*, and that none of the documents were ever shewn by *Phillips* or *Jordan* to the defendant *Boulnois*, or his solicitors, and that the same were afterwards returned to the plaintiffs, without ever having been produced or shewn to *Boulnois*.

The bill further charged, that, upon the purchase by publicans in *London* of premises to be used for the purpose of their trade, it is a usual and ordinary practice among the porter brewers to advance money to a publican, to enable him to complete the purchase, and to carry on the business; and that such sums are usually secured not by a legal mortgage, but by an equitable mortgage by means of a deposit of the title-deeds of the premises; and that *Boulnois*, as a wine and spirit merchant, was aware of this practice.

The plaintiffs supported the material allegations of their bill by the evidence of several witnesses. In reference to a statement made by *Jordan* in his answer and repeated in his evidence, namely, that, upon the occasion of the deposit, he signed a memorandum in a book, and also gave a promissory note to the plaintiffs; the clerk of the plaintiffs stated, that he could find no such memorandum or note amongst their papers, and that he never knew the plaintiffs to enter memoranda of that nature in a book. He said, however, that, in the hurry of business, it sometimes happened that such memoranda and notes of hand were omitted to be taken.

1835.
WHITBREAD
v.
JORDAN.

The clerk of the deputy steward of the manor of *Tottenham* being likewise examined for the plaintiffs, stated it to be the practice in that manor (and this was corroborated by the evidence of the deputy steward) to grant only one stamped copy of a tenant's admission; that the deponent had informed *Jordan* of that practice, and added that no new stamped copy would be granted to him; and that the loss of it would certainly prejudice his title. That, upon the occasion of the defendants *Jordan* and *Boulnois* calling upon the deponent respecting the intended mortgage to *Boulnois*, the deponent told *Boulnois* that he had better consult his solicitor as to what deeds would be necessary to effect the security. That, in consequence of this, the solicitor called on the deponent, and inquired if *Jordan* was tenant on the rolls, and if there was notice on the rolls of any incumbrance. That the deponent thereupon searched the rolls, and stated to the solicitor that he found no incumbrance: upon which the solicitor inquired whether a certificate of search was not usually given by the steward on these occasions; when the deponent replied, a certificate could certainly be had, if required; but the solicitor expressed himself satisfied, and dispensed with the certificate.

To shew that the defendant *Boulnois* had some sus-

1835.

WHITBREAD
v.
JORDAN.

picion of *Jordan's* situation with regard to the plaintiffs, they read the evidence of one *William Shenton*, which was corroborated in every material respect by the defendant *Boulnois* himself, in a further answer. The deponent stated, that, having heard that the premises were advertised for sale, he asked the defendant *Boulnois*, whom he knew to have had dealings with *Jordan*, how he stood with *Jordan*? to which *Boulnois* answered, that *Jordan* owed him a good deal of money; and he wished, that, if the deponent heard any thing of *Jordan's* circumstances, he would inform him, *Boulnois*, thereof. That some time afterwards the deponent asked *Boulnois* the same question, when *Boulnois* answered that he was all right, for that *Jordan* had given him a good security on his copyhold property. That, to the best of his recollection, the deponent expressed some surprise that *Jordan* should be able to give any security, inasmuch as the brewers usually took the best security that the publican could give. That *Boulnois* answered, "he has made it all right with me," or used words to that effect.

On the part of the defendant *Boulnois*, the evidence of *Jordan*, after some discussion as to whether it was receivable or not, was permitted to be read. He stated, in contradiction to the plaintiffs' case, that at the time when the deposit was made with the plaintiffs, he was possessed of a leasehold interest in the premises, by virtue of an under lease, of which a year and a half remained unexpired; and that he had also the reversion in fee in the premises. That the security intended to be given to the plaintiffs was solely upon the deposit of this lease, and not upon the reversionary interest. That, amongst the documents deposited, he did not include a copy of his admission to his reversionary interest, because he did not intend that the plaintiffs should have any other security than the lease. That, at the time of the deposit, it was not agreed or understood, between the plaintiffs and the deponent,

that the deponent should deposit the copy of his admission with the plaintiffs. That he signed a promissory note and memorandum at the time of making the deposit. That, in *April*, 1828, being in want of the further sum of 500*l.*, he obtained from the steward of the manor the copy of his admission, and took it to the plaintiffs, in order to induce them to make a further advance to him on that security; that he could not obtain from them such further advance, but that, being much in the power of the plaintiffs, and unwilling to offend them, he did not insist on taking back the copy of his admission, but left it in their custody. After adverting to the loan of the title-deeds to *Phillips* for the special purpose mentioned in the bill, the deponent stated, that, immediately after the trial of the ejectment at the end of the year 1829, they were given up by *Phillips* to the deponent, and retained by the deponent till *November* or *December* 1833; and that they could all, with the exception of the copy of his admission, have been produced to the defendant *Boulnois*, if he had insisted on their production.

The custom of brewers in *London* advancing money to publicans for the purposes of their trade, was admitted by the defendant *Boulnois* to be known to him, but he stated that he was ignorant whether such advances were made by way of legal or equitable mortgage.

Evidence was produced on both sides relative to the practice of solicitors upon the sale or mortgage of copyholds, in requiring or not requiring stamped copies of the admissions of the vendors or mortgagors. On the part of the plaintiff it was stated by several solicitors to be their practice—and, as they believed, the general practice of the profession—to require from the vendors or mortgagors of copyhold premises the production of such copies; and that it was the duty of the solicitor, if such copies could not be produced, to inquire and satisfy himself of the reason of their non-production, and to explain the circum-

1835.

WHITBREAD

v.

JORDAN.

1835.

WHITBREAD
v.
JORDAN.

stances to his client. On the other side, an equal number of solicitors were examined, who stated that they had always considered the court rolls to be the sole evidence of the title to copyhold estates. That, though the loss of title-deeds might materially affect the title to freehold property, the loss of copies of court rolls did not in their opinion affect the title to copyholds; and that they would accept, on the behalf of a purchaser or mortgagee, a title to copyhold property, where the mortgagor or vendor had lost or mislaid his copies of court roll, and had not in his possession any document of title whatever, if on the court rolls the title of such mortgagor or vendor appeared to be clear and unincumbered. That, within the knowledge of the deponents, it had always been the practice for the stewards, at the request and costs of copyhold tenants, to make out from the court rolls fresh copies of admissions whenever required so to do; and that the deponents had never known any refusal by a steward to grant fresh copies of admissions under such circumstances. In the opinion, however, of some of the deponents, such fresh copies, though stamped, were on paper, while the originals were on parchment. In the opinion of others, all copies indiscriminately were on parchment, differing only in date, or possibly in the stamp or signature of the steward.

Mr. *Wigram* and Mr. *Sharpe* for the plaintiffs, used the same arguments, and cited the same cases as had been brought to the attention of the Court on the previous occasion. They also contended, that it was impossible to believe the statement of *Jordan* relative to his mortgaging only his leasehold interest in the premises. They likewise insisted that the priority of the plaintiffs' lien was not destroyed by the loan to *Phillips*; such loan having been made, like that in *Ex parte Meux* (a), for a particular purpose and upon an agreement of redelivery; but that

(a) 1 Gl. & Jam. 116.

all difficulty which might arise upon that point was removed by the fact, that *Jordan*, if he received the deeds from *Phillips*, never produced them to *Boulnois*.

1835.
 WHITBREAD
 v.
 JORDAN.

Mr. *Simpkinson*, Mr. *Kindersley*, and Mr. *Chandless*, for the defendant *Boulnois*.—The question is, whether a person taking a *bond fide* security is to be postponed because he has not taken every little precaution which it was possible to take. It is laid down in *Scriven on Copyholds*, that the “ vendor of copyholds is bound at his own expense to produce to a purchaser the originals or authenticated copies of such documents as are comprised in the abstract of title, whether on record or not; and must therefore obtain further certified copies of any surrenders, admissions, or other acts entered upon the court rolls, when the copies originally made out and delivered by the steward are lost (a).” Now in this case, according to the plaintiffs’ evidence, *Jordan* could not have obtained fresh copies, it not being the practice in the manor to give them. In truth, however, such copies are mere waste paper. It is clear, that, by the custom of many manors, fresh copies of admissions may be obtained at any time upon application. The evidence of many respectable solicitors establishes that fact; and indeed it is clear that the Stamp Act contemplates the granting of subsequent copies. These copies, however, are not essential to making out the title; on the contrary, it is in evidence that a large proportion of professional men are satisfied if a clear title appears upon the court rolls. Now in the present case, *Jordan* is asked for an abstract or copies; he says he has lost or mislaid them: an inquiry is then made of the steward; there appears to be no incumbrance on the court rolls, and the defendant is satisfied with *Jordan’s* assertion and with the title as he finds it. Then

(a) Vol. 1, p. 186.

1835.

WHITBREAD
v.
JORDAN.

why is he to be put to the useless expense of having a copy of what he himself has inspected? The decision of Lord *Eldon*, in *Ex parte Warner* (a), has always been considered to carry the doctrine of lien very far; and in *Ex parte Corrie* (b), Sir *John Leach* appears to have decided the contrary.

But supposing that with an indefeasible title appearing on the rolls, it is the custom nevertheless for the vendor to produce these copies; is such a custom sufficient to vitiate this transaction? The facts of this case are much more favourable to the legal mortgagee than are the corresponding facts in *Plumbe v. Fluitt* (c), a case which is fully supported by *Evans v. Bicknell* (d), *Wiseman v. Westland* (e), and *Martinez v. Cooper* (f). [*Alderson*, B.—In *Plumbe v. Fluitt*, the only circumstance against the legal mortgagee was the non-production of the title-deeds. If you could reduce the present case to the simple question of non-production, then *Plumbe v. Fluitt* would be an authority in your favour.] Admitting that in this case the defendant was guilty of some degree of negligence, still the laches was equal on both sides, and the defendant has got the legal estate. He might, it is true, by a very particular inquiry have ascertained that the plaintiffs had a lien on the property; but the circumstances of the property were not such as to excite suspicion or to give grounds for inquiry. Had it been in the possession of persons connected with the plaintiffs, or if their agent had been often seen upon the premises, the omission to inquire would not have been justified. Here the only ground for inquiry which can be possibly suggested is, the circumstance that the defendant knew or ought to have known the usual mode of dealing between brewers and publicans, in regard to the deposit of leases. But

(a) 19 Ves. 202; 1 Rose, 286.

(b) Eden, B. L. cap. 17, sect. 5.

(c) 2 Anstr. 432.

(d) 6 Ves. 174, 183.

(e) 1 Y. & J. 117.

(f) 2 Russ. 198.

that is not a custom of which he was bound to take notice, nor will it relieve brewers from the consequences of general rules of equity. It then becomes a question whether the defendant, having shewn equal diligence with the plaintiffs in completing his security, is not, under all the circumstances, to have the preference; and whether they can sustain this bill against him, without shewing that they have done every thing in their power to prevent the possibility of fraud. In some cases of incumbered property, the creditor who, without having any legal transfer made to him, merely gives notice of his incumbrance to the trustees of that property, is held to be entitled to priority over a creditor who has not given such notice: *Dearle v. Hall* (a). But in this case the defendant has gone a step farther, and has taken the precaution to have the legal estate conveyed to him: *Foster v. Blackman* (b). It was not necessary for him to take further precaution; and unless he can be fixed with *crassa negligentia*, or negligence amounting to evidence of fraud, there can be no decree against him. The true principles which determine *crassa negligentia* in cases of purchase, are pointed out by Lord *Erskine*, in *Hiern v. Mill* (c), where his Lordship adverts to the absurdity of purchasing lands without a careful inquiry for the title-deeds. Those principles, however, scarcely apply to the purchase of copyholds, and the cases which have been decided upon them materially differ from the present. *Head v. Egerton* (d), 1 *Fonbl. Treat. Eq.* 167.

1835.
 WHITBREAD
 v.
 JORDAN.

Mr. *Bligh* and Mr. *Bethell* for the assignees of *Jordan*.—The plaintiffs have no charge upon the inheritance of the premises in question. Upon the advance of the 2000*l.* being made, the lease was the only security given to the

(a) 3 Russ. 1.

(b) 1 Myl. & K. 97.

(c) 13 Ves. 119, 122.

(d) 3 P. W. 280.

1835.

WHITBREAD
v.
JORDAN.

plaintiffs. It is admitted, that, at the time of the deposit, the copy of *Jordan's* admission was not in their hands. Afterwards, in the year 1828, *Jordan* handed it over to them; but that was done for the express purpose of obtaining a further loan from the plaintiffs, and it formed no part of the original security. The lease therefore was the only interest comprised in the deeds which were deposited with the plaintiffs. Now, upon a deposit of deeds, the security cannot be carried beyond the estate which appears on the deeds themselves: *Ex parte Pearse* (a), *Ex parte Wetherell* (b). It is said, however, that the evidence of the circumstances under which the deposit was made, is contradictory. If that be so, no lien can be established: 1 *Mad. Ch.* 538. [*Alderson*, B.—The contradictory evidence must be such as embarrasses the judge.] The law on the subject of equitable mortgages has already been carried too far: *Ex parte Hooper* (c). Here the plaintiffs have not completed their security. The lord of the manor is the trustee of the court rolls for all the copyholders: when therefore the plaintiffs took the copy of *Jordan's* admission, they should have given notice of that fact to the lord as to any other trustee: *Dearle v. Hall* (d), *Loveridge v. Cooper* (e). If their title is not perfected, they cannot set it up against the assignees.

Mr. *Wigram*, in reply.—After the decision in *Ex parte Warner* (f), confirmed by that of *Winter v. Lord Anson* (g), there can be no question as to the validity of the deposit of the copy of court roll by way of mortgage. Now, here all the title-deeds relating to the premises, and not a part only, were deposited with the plaintiffs; and therefore *Ex*

(a) Buck, 525.

(b) 11 Ves. 398.

(c) 1 Mer. 7.

(d) 3 Russ. 1.

(e) Id. 30.

(f) 19 Ves. 202; 1 Rose, 286.

(g) 3 Russ. 492.

parte Pearse, and the other cases of partial deposit are not applicable. Then the deeds so deposited related to the fee of the premises; and it is perfectly clear, notwithstanding *Jordan's* evidence, that it was the fee upon which the plaintiffs advanced the money. With respect to the defendant *Boulnois*, he had at least constructive notice of this transaction. Upon the motion for the injunction, Lord *Lyndhurst* was strongly of opinion, that there were sufficient circumstances to put the party on his inquiry, though his Lordship added that he would not prejudge the question. Now it is clear, that *Boulnois* had knowledge of the dealings between brewers and publicans, and he must have at least had suspicion of this particular transaction. Either he was afraid to ask his solicitors too much, or having taken upon himself to act, he did not give them that full information which was necessary for further inquiry. The cases of *Evans v. Bicknell* (a), and *Plumbe v. Fluitt* (b), in which the particular facts charged were held not to amount to *crassa negligentia* or fraud, do not affect the present case. *Martinez v. Cooper* (c) is altogether different in its circumstances. There is no case in which any facts, which ought to put a party on his inquiry, having been proved to come under his observation, the Court has nevertheless decreed in his favour. If a man overlooks such facts, the Court will sometimes excuse him; but never when they have been brought under his observation.

The whole question amounts to this: whether, in the consideration of a Court of Equity, a person may have an interest in copyhold property, though holding a security which is not upon the court roll; whether, in short, there may be an equitable mortgage of copyhold property. It is said that notice should have been given to the lord of the delivery to the plaintiffs of the copy of *Jordan's* admis-

1835.

WHITBREAD
v.
JORDAN.

(a) 6 Ves. 174.

(b) 2 Anstr. 432.

(c) 2 Russ. 198.

1835.

WHITBREAD
v.
JORDAN.

sion; and in support of that argument, *Loveridge v. Cooper* (a) has been cited. No doubt, upon the authority of that case, there is no perfect assignment of an equitable interest, without notice to the trustee in whom the property is vested: but the lord or steward of the manor does not stand in that situation; and a notice to an immaterial party is a mere nullity. Here there was no party to whom such notice could have been given. [*Alderson*, B.—There is no evidence to shew, that it is usual to give such notices.] Then the question is, whether the defendant has exercised that caution which he was bound to exercise, in order to guard against invading the rights of the plaintiffs. Now it is clear, that he should have used so much circumspection in this matter as a prudent man would have used in the conduct of his own affairs. In this case the security was taken for an antecedent debt; but suppose an application had been made to the defendant for a loan, and he had known that the deeds were in the possession of the plaintiffs, would he have advanced the money without making any inquiry of the plaintiffs on the subject? Equity says, that where a man in the course of his dealings may possibly affect the rights of third persons, he shall use just so much precaution against trenching upon those rights, as he would have used for the preservation of his own.

Feb. 28th.

ALDERSON, B.—This was a case originally made by bill filed against the defendants *Jordan* and *Boulnois*, and afterwards by supplemental bill against the present defendants and *Boulnois*, *Thomas Jordan* having in the interim become a bankrupt, praying that an account might be taken against the assignees of *Jordan*, as to the sums remaining due from them as such assignees to the plaintiffs; and also, that it might be declared that in respect of such account they might have the priority over any claim upon

(a) 3 Russ. 30.

certain copyhold premises, called the *Valiant Trooper*, by the defendant *Boulnois*.

The case was very fully and ably argued before me a few days ago; and I have taken time to examine the facts, and authorities quoted, before I proceeded to give my judgment in the cause.

The claim of the plaintiffs depends, as regards the assignees of *Jordan*, upon the fact, whether certain documents, being surrenders and admittances relating to the copyhold property in question, were deposited with them under such circumstances as to give to them an available equitable mortgage on the property in question; and whether any thing has since occurred by which that equitable mortgage, if it ever existed, has been given up.

I take it to be well established law, that there may be an equitable mortgage of copyhold property, and that the deposit of title-deeds relating to freehold property, if made under proper circumstances, may amount to an equitable mortgage. The authority of Lord *Eldon*, in *Ex parte Warner* (a), is full and express upon the point; and in the case of *Winter v. Lord Anson* (b), Lord *Lyndhurst* expressed a clear opinion to the same effect; an opinion to which in the previous motion in this individual cause he still adhered. In opposition to this, there is only a vague suggestion that a case to the contrary is supposed to have been decided by Sir *John Leach*, when Vice Chancellor. I must doubt the accuracy of such a statement; and when I find the case itself opposed to clear and recognised authorities, proceeding, as it seems to me, on plain and clear principles, I cannot for a moment doubt which I ought to follow. In the absence of these authorities, I feel no doubt that I ought to have come to the same conclusion, referring only to the principle stated by Lord *ELdon*, as the ground on which Lord *Thurlow's* decision as

1835.

WHITBREAD
v.
JORDAN.

(a) 19 Ves. 202.

(b) 3 Russell, 493.

1835.

WHITBREAD
v.
JORDAN.

to freehold lands originally proceeded; and which, if sound, applies equally to the deposit of the title-deeds of copyhold as of freehold.

Then if so, it is only a question of fact, whether these deeds were so deposited as to give the plaintiffs an equitable mortgage on the property. It is clear, that, on the 15th of *November*, 1827, an advance of 2000*l.* was made by the plaintiffs to *Jordan*, and that certain deeds, which did not, however, include the admittance in fee of *Jordan* to the copyhold estate, were deposited with Messrs. *Whitbread & Co.* as a security for that advance. In this, all the testimony concurs; but *Jordan*, who has been examined as a witness, states that the only deeds intended to be deposited were those actually deposited, and that the only interest intended to be pledged was a leasehold interest, and not the fee in the premises in question. On the other hand, the evidence for the plaintiffs goes to shew, that the agreement was for a deposit by him of all the interest which he then had in the premises, and that it was concluded that the deeds deposited were to that effect; and that on its being subsequently discovered in *April*, 1828, that the copy of *Jordan's* admission in fee was not included, it was on application to him immediately supplied, and that then a complete deposit in performance of the original agreement was ultimately effected. This makes it unnecessary to advert to those cases of partial deposits of title-deeds cited in the argument. For here I apprehend that the facts shew, that the whole of the deeds, though deposited at different times, were in truth deposited under one and the same agreement, made at the time of this original advance of money by the plaintiffs to *Jordan*. It is clear, that, on the 21st of *April*, 1828, the admission of *Barnett* to the premises was handed over to *Jordan* at his request; and that, on the 28th of *April*, he returned it, together with the other deeds, and his own admission in fee, to the plaintiffs, by whom they have ever since been

kept. *Jordan's* account of this transaction appears to me to be incredible, and inconsistent with the admitted facts of the case. He is a witness, who, by his own shewing, has been guilty of something very like a fraud upon the defendant *Boulnois*; and his testimony therefore should be received with great caution. I think him a competent witness, but not a credible one. It seems to me, also, that his statement as to the original deposit is equally inconsistent with the real facts of the case. I cannot think it credible that Messrs. *Whitbread* should have ever agreed to advance 2000*l.* on the security of any thing except the fee of the copyhold premises in question. He says, that it was on the leasehold interest. Now, at the time of the deposit, the only leasehold interest which he possessed, had expired, and was consequently of no value; and the other leasehold interest which it is suggested in argument, but not in proof, that he might have meant to deposit, was one of which he did not become possessed till some time afterwards, and when he did, it was by a purchase for less than 100*l.* I cannot believe that this could have been taken by any man in his senses as a security for an advance of 2000*l.* On the other hand the evidence of the plaintiffs' witnesses is consistent with the probability of the case.

I have no doubt, therefore, that in this case there was a deposit of the deeds under circumstances in which the plaintiffs would be entitled to an equitable mortgage on the fee of the premises in question. Under these circumstances a part of the deeds so deposited were afterwards delivered over by the plaintiffs to *Jordan's* attorney, *Phillips*, in 1829. This fact, to my mind, affords a strong confirmation of the accuracy of the previous conclusion at which I have arrived. But another question arises upon it, viz. whether it has at all affected the plaintiffs' claim. I think the cases cited in argument shew that it has not. For it was a delivery over to him not generally, but for a specific purpose; and the deeds were again, after that spe-

1835.

WHITBREAD
v.
JORDAN.

1835.

WHITBREAD
v.
JORDAN.

cific purpose was accomplished, returned to the plaintiffs. In addition to this, it is to be observed that the important deed, the admission in fee, was never parted with at all. This brings me to the main question in this case, which affects the defendant *Boulnois* alone.

He, it seems, is possessed of a legal mortgage of these copyhold premises, to secure about 2500*l.*, which has been executed to him since the deposit with the plaintiffs of the title-deeds by *Jordan*. Now it is conceded, that if he is a purchaser for valuable consideration without notice, he is entitled to priority over the equitable mortgagee. There is no doubt that, under the circumstances here disclosed, he is a purchaser for a valuable consideration; but the doubt is, whether he is a purchaser without notice.

If, indeed, by notice be meant actual notice, there is no proof of any such actual notice brought home to him. But the cases establish that constructive notice is enough. If, for instance, a party having knowledge of a deposit, avoids asking the circumstances under which such deposit was made, the Court may reasonably infer that he omitted to do so, in order to avoid having express notice; and they will in that case hold it equivalent to express notice: that was the case of *Birch v. Ellames* (a). On the other hand, the mere fact of the deeds not being forthcoming was held in *Plumbe v. Fluitt* (b) not sufficient, if unaccompanied by other circumstances, to raise such a conclusion. But I apprehend that when a party having knowledge of such facts as would lead any honest man, using ordinary caution, to make further inquiries, does not make, but, on the contrary, studiously avoids making such obvious inquiries, he must be taken to have notice of those facts which, if he had used such ordinary diligence, he would readily have ascertained. He is not, indeed, bound to use extraordinary circumspec-

(a) 2 Anstr. 427.

(b) 2 Anstr. 432.

tion; nor, on the other hand, do I apprehend it to be necessary to make out express fraud on his part. If he be grossly negligent in omitting to inquire, it is at all events quite sufficient to fix him with notice; for, as it is well laid down in 1 *Equity Cases Abridged*, 331, Pl. 7, the purchaser who cannot make out a title but by a deed which leads him to another fact shall be presumed cognizant thereof, for it is *crassa negligentia* that he sought not after it. Now what are the facts here? It is clearly established, by the evidence on both sides, that it is a very general practice for persons in the situation of *Jordan*, being in distress for money, to deposit either with their brewer or spirit merchant, in case they are indebted to him, their title-deeds, for the purpose of giving an equitable mortgage. It is reasonable to conclude that *Boulnois*, a spirit merchant, was acquainted with this; and in fact, it would appear from his own account of the transaction, that when the mortgage was talked of between himself and *Jordan*, he was aware of it. He knew that *Jordan* was indebted to the plaintiffs, and he asked him whether his property was not under mortgage to his brewers for the amount due. He knew also, from the transaction itself, that *Jordan* was much in want of money. The evidence of *William Shenton* is strong upon this part of the case, and also as to the knowledge, on the part of the defendant *Boulnois*, of the ordinary practice of brewers before mentioned. Now when, under these circumstances, he also found that *Jordan* had not possession of, or at least, that he could not produce the ordinary *indicia* of property, the title-deeds of his copyhold estates, it appears to me almost impossible to conceive how, without the grossest neglect on his part, he should have omitted to apply to the plaintiffs for information. Instead of that, however, he seems to have been contented with a reference to the manor rolls, which of course could only inform him as to any legal incumbrances on the estate; and there is a labo-

1835.

WHITBREAD
v.
JORDAN.

1835.

WHITBREAD
v.
JORDAN.

rious inquiry into that part of the case, which, contrasted with the absolute neglect to make any inquiries in the most natural and obvious quarter, is any thing but satisfactory to my mind as to the *bona fides* of the transaction. I do not particularly advert to the contradictory evidence as to the custom of obtaining fresh copies of admissions and of accepting titles of copyhold estates, on which much argument was employed and many witnesses examined: for whatever may be the result of this part of the case, there is no evidence at all which shews that any attorney or skilful person would, with a full knowledge of all the circumstances known to the defendant *Boulnois*, have omitted to make the inquiry above suggested. And, in fact, it appears, that, either from negligence or design, there was an omission on the part of *Boulnois* to make a full communication to his solicitor, Mr. *Appleby*, of this most material fact in the case. Upon the whole, I think, this is such gross negligence as would be a cloak for fraud if permitted, and that it must be held to amount to constructive notice to the defendant *Boulnois* of the prior equitable mortgage to the plaintiffs.

I think, therefore, that *Boulnois* is in no better situation than *Jordan* himself would be with respect to the plaintiffs' claim, and that the plaintiffs are entitled to the account they claim against the assignees of *Jordan*, and to priority against the claim of *Boulnois*. I think, also, that the decree as against *Boulnois* should be with costs, but as regards the assignees without costs.

Decree accordingly.

1835.

ANONYMOUS.

March 3, 4.

A BARRISTER had attended the Court during its sittings in *Gray's Inn* Hall, upon a motion for a receiver in a cause in which he was a defendant. He did not attend as counsel, but as a party in the cause, and to instruct the counsel retained on his behalf. After the motion had been disposed of, he left the Hall, and had proceeded a few paces into *Holborn Court*, when he was arrested. He represented to the sheriff's officer that he was privileged from arrest, and required to be taken into Court that he might be discharged. The officer refused to bring the party into Court, and carried him to a lock-up-house.

Mr. *Younge*, who had been counsel for the defendant on the motion for the receiver, moved for his immediate discharge.

The LORD CHIEF BARON expressed some doubt as to his authority to make the order, as the party was not in Court, and recommended a writ of *habeas corpus* to be obtained.

A writ having been accordingly sued out, the party was brought up for his discharge on the following morning.

A barrister who had attended the Court, not professionally, but as a party interested on a motion for a receiver, was arrested by a sheriff's officer shortly after he had quitted the Court: the officer refused to bring him into Court, and took him to a lock-up-house. On motion for his immediate discharge, the Court doubted whether he could be discharged without being brought into Court, and recommended a writ of *habeas corpus* to be issued; which having been done, and the party brought into Court, he was discharged, and the sheriff was ordered to pay the costs.

Mr. *Younge*, on behalf of the party, cited *Eylesbury v. Troughton* (a), *Lightfoot v. Cameron* (b), and *Orchard's case* (c), and was stopped from citing other cases by the Court.

Mr. *Hoggins*, for the sheriff, resisted the application.

(a) 1 Ch. Rep. 92.

(b) 1 Sir W. Bl. 113.

(c) 5 Russ. 159.

1835.

ANONYMOUS.

The LORD CHIEF BARON ordered the prisoner to be discharged, and the sheriff to pay the costs of the proceeding.

MEMORANDA.

DURING the vacation after *Hilary* Term, His Majesty was pleased to appoint *Thomas Starkie*, Esq., and *Robert Alexander*, Esq., both of *Lincoln's Inn*, to be his counsel learned in the law.

On *Thursday* the 23rd of *April*, Lord *Lyndhurst* resigned the Great Seal, which was on the same day delivered by His Majesty to the Right Honourable Sir *Charles Christopher Pepys*, Knt., Master of the Rolls, the Right Honourable Sir *Launcelot Shadwell*, Knt., Vice Chancellor of *England*, and the Honourable Sir *John Bernard Bosanquet*, Knt., one of the Justices of the Court of *Common Pleas*, as Lords Commissioners for the custody thereof.

About the same time Sir *Edward B. Sugden*, Knt., resigned the office of Lord High Chancellor of *Ireland*, and was succeeded by Lord *Plunkett*.

Sir *Frederick Pollock*, Knt., resigned the office of Attorney-General, and was succeeded by Sir *John Campbell*, Knt.; and Sir *William Webb Follett*, Knt., resigned the office of Solicitor-General, and was succeeded by *Robert Monsey Rolfe*, Esq., one of His Majesty's counsel, who was soon afterwards knighted.

1835.

April 25th.

TARLETON *v.* HORNBY.

THE Court having in this case allowed the demurrer of the defendant *James Barnes*, one of the assignees under the bankruptcy of the plaintiff (a), the defendant, *John Hornby*, another of the assignees, put in the following plea in bar of the plaintiff's suit:—

“ This defendant, by protestation &c., doth plead to the said amended bill (b), and for plea saith, That by the means hereinafter mentioned, *James Barnes*, in the said bill mentioned, hath ceased to be a party, and is not now a party to the said amended bill. And this defendant for plea further saith, That, on the 10th day of *November*, 1834, the said *James Barnes*, being then a party defendant to the said amended bill, duly put in and filed in this honourable Court a general demurrer to the said amended bill; and by such demurrer prayed the judgment of this honourable Court, whether he ought to be compelled to put in any further or other answer to the same bill; and he by his said demurrer prayed to be dismissed with his reasonable costs in that behalf sustained. And this defendant for plea further saith, That the said demurrer was duly set down for argument in this honourable Court, and duly came on to be heard before the Right Honourable the Lord Chief Baron of this Court; whereupon counsel appearing as well for the said plaintiff as for the said defendant *James Barnes*, the same was debated before his Lordship. Whereupon his Lordship, the Lord Chief Baron, by an order of this honourable Court, bearing date the 23rd of *January*, 1835, duly made upon the said bill and demurrer, did think fit to allow the said demurrer; and the same being to the whole of the said complainant's

To a bill against the assignees of a bankrupt for a general account of their dealings under the bankruptcy, one of the assignees demurred for want of equity, and the demurrer was allowed:--*Held*, that the other assignees might plead this matter in bar of the suit.

(a) Ante, p. 172.

(b) The bill was, in fact, an amended bill. It was thought

unnecessary to mention that circumstance in the former report.

1835.

TARLETON
v.
HORNBY.

bill, the Court did order that the said complainant's bill did stand dismissed out of this Court as against the said defendant *James Barnes*, with costs, to be paid by the said complainant to the said *James Barnes*; and such order hath been duly inrolled in the office of His Majesty's Remembrancer of this honourable Court, as by such demurrer and order and inrolment respectively remaining as of record in this honourable Court, reference being thereto had, will appear; and which order this defendant saith now stands unreversed and in full force: wherefore and whereby the said *James Barnes* hath ceased to be and is not now a party to the said amended bill. All which matters," &c.

Mr. *Spence*, Mr. *G. Richards*, and Mr. *Booth*, in support of the plea.—The bill was filed for an account against all the assignees, all of them being necessary parties for that purpose. Now the demurrer of one of the assignees was allowed upon the merits, which shews that there was no equity against any of them; for it never was yet understood that a plaintiff might call several persons to an account and obtain a decree against some of them only. The plea therefore of this defendant must be allowed, and it cannot be objected that the matter pleaded has occurred since the filing of the bill: *Turner v. Robinson* (a), *Barnes v. Wilson* (b).

Mr. *Simpkinson* and Mr. *Teed* for the bill.—The plea does not involve any of the points on which the demurrer was allowed; it relates to matter which has occurred subsequently to the filing of the bill, and, therefore, it is not sustainable. In the two cases which have been cited for the defendant, no allusion was made to the case of *De Minckwitz v. Udney* (c), in which a plea of this nature was

(a) 1 S. & S. 3. (b) In Ch. 29 June, 1830. (c) 16 Ves. 466.

overruled. In *Rowe v. Wood* (a), which was a suit for an account, one of the defendants pleaded an agreement which had been entered into since the commencement of the suit, and Lord *Eldon* held that such a plea could not be allowed in equity. The present, however, is not merely a bill for an account. The defendants are charged with fraud; and the absence of one of the parties committing the fraud does not prevent the plaintiff from pursuing his remedy against the others: *Walker v. Symonds* (b). The decree against this defendant will not be made on the ground of contract, but on that of fraud.

1835.

TARLETON
v.
HORNBY.

Mr. *Spence*, in reply.—*De Minckwitz v. Udney* is not applicable to the present case, because there the defendant pleaded the insolvency of the plaintiff, which was immaterial, inasmuch as his assignee might come in by supplemental suit. [The *Lord Chief Baron*.—The difficulty I have is, how I can take notice of the ground on which the demurrer was allowed.] It is only necessary to shew that *Barnes* is removed as a party to the suit. Not that the fact which has occurred, has merely had the effect of transferring an interest; on the contrary, though it occurred subsequently to the filing of the bill, it shews that the suit was bad *ab initio*. This is not a bill of tort, but of common account; and yet the names of two only of the three assignees who are called upon to account appear upon the record. The case of *Walker v. Symonds* is inconvenient in practice, and the late Master of the Rolls never admitted its authority. In that case, however, there was no question of account. One specific sum was misapplied; and the question was, whether the plaintiff could sue one of the trustees only in respect of that misapplication. In the present case it would be necessary to go into an account in the first instance in order to ascertain whe-

(a) 1 J. & W. 315.

(b) 1 Swanst. 75.

1835.

TARLETON
v.
HORNBY.

ther there was any thing to misapply. It is true that there is a charge in the bill that the sale of some of the property was made at an undervalue, but the Court will not admit the bill against the two, where the third might be the very one to prove that a full value was given. Besides, if there be a surplus, it cannot be decreed to be paid by *A.*, *B.*, and *C.*, *C.* being absent.

The LORD CHIEF BARON.—The objection that the plea is too late, because the matter pleaded has occurred since the bill was filed, appears to me to be immaterial. The case of *De Minckwitz v. Udney* has no application to the present, because there the bill was properly filed against the only party who could administer the relief prayed for. After the bill was filed the plaintiff became insolvent; but the effect of that was, not to destroy the plaintiff's right to relief, but only to compel him to bring before the Court the assignee. It would have been different if the bill had been filed after his insolvency, because the answer to that would have been, that the law had taken from him the title to sue, and had given it to his assignee: whereas, in the case cited, the bill could be filed in no other manner.

Another case which has been cited has had a stronger tendency to shake my opinion. The principle is no doubt just, that mere wrong doers, who have no other connexion with each other than the common injury they do, may be brought to account for their transactions either singly or altogether. It is a familiar principle of law that an action of trespass may be brought either against all the joint trespassers, or against each of them singly: it is equally true that at law the joint trespassers cannot sue *inter se* for contribution. The question is, whether these principles apply to the present case and bring it within the rule, that where trustees are guilty of a breach of trust they may be sued either jointly or separately, which is the case

of *Walker v. Symonds* (a). That case, however, appears to me inapplicable. This bill calls the defendants to account as assignees, and nothing can be done completely in the suit, till they do account. It would be unjust to say that one of these persons—who, it is to be recollected, are made trustees by act of Parliament—that one only shall be called upon to give that account, which possibly the other only could justly give. The other might be the very person who could best inform the Master or the other parties upon the subject. This is not like an account required of one specific sum; on the contrary, the assignees are called upon to give an account of joint transactions. If we were to take it *pro confesso* that the whole of the debts were paid, and that a certain sum remained in their hands, which was misapplied by them, then the case of *Walker v. Symonds* might require application. In the present case, however, we have not arrived at that stage of the proceedings, but only at the account. Then the question is, whether an uncertificated bankrupt, who has not superseded his commission, but has resisted it, shall be allowed to call his assignees to an account of their proceedings under the bankruptcy; and that has been already decided. The plea must be allowed.

1835.
TARLETON
v.
HORNBY.

(a) 1 Swanst. 75.

1835.

May 8th, 12th.

SMITH v. SMITH.

A., upon his marriage, executed to the trustees of his marriage settlement a bond, and also a mortgage of his estates at *S.*, for securing to them a sum of 15,000*l.*, the trusts of which were declared to be for *A.* for life, and afterwards for the benefit of his wife and children. *A.* not having paid this sum at the time specified in the bond, without notice to the trustees, assigned his life interest therein to *B.*, as a security for the repayment of a debt due from *A.* to *B.* *A.* having afterwards become bankrupt, *B.* filed his bill against the trustees and the assignees under the bankruptcy, to obtain the benefit of his security; and a decree was made in that suit, directing the life interest of *A.* in the 15,000*l.* to be sold, and the produce to be paid to *B.* In the course of the proceedings in the bank-

ruptcy, the assignees sold the *S.* estates, but the proceeds of the sale did not amount to 15,000*l.*:—*Held*, that the trustees were entitled, as against *B.*, to retain the annual produce of the sum for which the *S.* estates were actually sold, until the whole of the 15,000*l.* should be reinstated.

JOHN MABERLY, Esq., upon his marriage with *Ann*, the daughter of *James Baillie*, Esq., executed a bond to the trustees of the marriage settlement, conditioned for payment to them of the sum of 15,000*l.*, with interest, within six months after the marriage. He likewise, as a further security for that sum, executed to them a mortgage of his estates at *Shirley*. A like sum was secured to the trustees by the bond of Mr. *Baillie*, and was payable to them twelve months after his decease. By the terms of the settlement, the trustees were to invest these two sums, when and as they became payable, either in the public funds or upon real securities, and were to pay the interest and dividends thereof to *Maberly* for his life, and after his decease for the benefit of his widow and children, as mentioned in the settlement.

Upon the death of *Baillie*, which took place before the year 1828, the sum of 15,000*l.*, which had been secured by his bond, was paid to the surviving trustees of the settlement, and by them invested in the purchase in their names of 15,824*l.*—3*l.* 10*s.* *per cent.* Reduced Annuities. The sum of 15,000*l.*, which had been secured by *Maberly's* bond and mortgage, was not paid to the trustees at the time limited by the settlement.

Maberly being indebted to the plaintiff in a sum of 13,600*l.*, for the purpose of securing the repayment of that sum, with interest, executed to the plaintiff a bond, bearing date the 22nd of *June*, 1829, and by an indenture of assignment of even date with the bond, he assigned to the plaintiff his life interest in the 15,824*l.* stock, and 15,000*l.* sterling, upon trust, in case default should be made

1835.

SMITH
v.
SMITH.

in repayment of the said debt of 13,600*l.* by a given day, to sell *Maberly's* life interest in the above-mentioned sums, and to reimburse himself out of the produce of the sale.

In *January*, 1832, a fiat in bankruptcy was awarded and issued against *Maberly*, under which he was declared a bankrupt; and soon after that event, the plaintiff applied to the trustees of the settlement for payment to him of the dividends of the 15,824*l.* stock. The trustees, however, refused that application, and in the mean time retained the dividends in their own hands. The plaintiff then filed his bill against the trustees and the assignees under the bankruptcy, praying for an account of what was due to him for principal and interest in respect of his debt; that it might be declared, that, for securing the repayment of such debt, he was entitled to *Maberly's* life interest in the said 15,824*l.* stock, and 15,000*l.* sterling; that such life interest might be sold; and that he might be at liberty to go in under the fiat, and prove as a debt the difference between the value of *Maberly's* life interest and the amount of what remained due to him.

By the decree made on the hearing of the cause, and dated the 23rd of *November*, 1833, it was amongst other things declared that the plaintiff was entitled to the benefit of the assignment of the 22nd of *June*, 1829. That an account should be taken of what was due to the plaintiff for principal and interest on his debt. That the trustees should pay the dividends due and to grow due on the said 15,824*l.* stock, during the life of *Maberly*, to the plaintiffs, until the life interest of *Maberly* therein should be sold. That they should raise and receive the interest which had accrued due since the 22nd of *June*, 1829, in respect of the said sum of 15,000*l.* secured upon mortgage as aforesaid, and all such interest as should thereafter accrue due in respect thereof during the life of *Maberly*, until his life interest therein should be sold, and should pay the same to the plaintiff. That the assignees should

1835.

SMITH
v.
SMITH.

forthwith proceed to a sale of *Maberly's* life interest in the said two sums, and should pay the produce arising from the sale, after deducting expenses, to the plaintiff. That after such accounts were taken, and payments made, the plaintiff should be at liberty to prove the balance under the fiat, and to be paid a dividend thereon rateably with the other creditors of the bankrupt.

In pursuance of this decree, the assignees sold the life interest of *Maberly* in the 15,824*l.* stock by public auction, the plaintiff being the purchaser thereof at the price of 3250*l.* They, however, delayed the sale of *Maberly's* life interest in the 15,000*l.* sterling, until the *Shirley* estates upon which that sum was secured should be sold. Upon the sale of those estates, it was found that the proceeds were insufficient to raise the whole of the 15,000*l.*

Under these circumstances, it became a question whether the trustees were entitled to retain, during the life of *Maberly*, the annual produce of the sum produced by the sale of the *Shirley* estates, until the whole 15,000*l.* should be raised; or whether the assignees should sell the life interest of *Maberly* in the sum actually raised, though it did not amount to 15,000*l.*

In order to settle this question, the assignees presented their petition in the cause, alleging that the decree contained no direction to the Master to settle the conditions of sale of the life interest in the 15,000*l.*, and praying that the sale might take place before the Master, under such particulars and conditions of sale as he might approve; or that it might be referred to the Master to settle and approve the particulars and conditions of sale under which the petitioners should proceed to sell the life interest by public auction as directed by the decree.

Mr. *Simpkinson* and Mr. *Spence* for the petitioners, the assignees.—Admitting that the question which has been raised has been left open by the decree, the present case

comes within the principles on which *Stratton v. Hale* (a), *Ex parte Smith* (b), and *Ex parte Shute* (c), were decided. *Stratton v. Hale* is reported to have been overruled by *Ex parte Turpin* (d); but the correctness of the latter decision may be doubted. Giving, however, full weight to that authority, it does not necessarily govern the present case. There the question was between parties representing the bankrupt himself and the trustees. The assignees could only take the bankrupt's interest, subject to all the equities to which that interest was liable; and the Court held that as the bankrupt could not, before the whole sum was made up, have demanded the interest upon it, so neither could the assignees. Here the party who really makes the claim is a purchaser for a valuable consideration from the bankrupt. He is not bound to make up the 15,000*l.* His interest was secured, at the hearing, against all the other parties. By the terms of the decree, he is entitled to the interest, not of 15,000*l.* absolutely, but of 15,000*l.* secured by mortgage, let the mortgaged estates realize what they will. The decree expressly directs that that interest shall be paid to him.

1835.

SMITH
v.
SMITH.

Mr. *Wigram* and Mr. *G. Richards*, for the trustees.—The decree was not framed with reference to the event which has occurred. It did not contemplate a deficiency in the value of the mortgaged property. Supposing there was no bankruptcy, there would be no question but that the trustees would have a right as against *Maberly* to retain his life interest. They would also have the same right against *Maberly's* assignee, as against *Maberly* himself. In *Priddy v. Rose* (e), where a person on his marriage had covenanted to pay 4000*l.* to the trustees of the

(a) 2 Bro. C. C. 490.

(d) Mont. 443.

(b) Co. B. L. 223.

(e) 3 Mer. 86.

(c) 3 D. & C. 1.

1835.

SMITH
v.
SMITH.

settlement, and had failed to do so, the trustees were permitted to retain, in satisfaction of that sum, the dividends on certain stock in their hands, in which the settlor had a life interest, although those dividends had been assigned for value. In the course of his judgment, Sir *William Grant* said—"If as against *Hunt*, (the settlor), the trustees had the equity of stopping the dividends to make good the debt of 4000*l.*, could he by this act, without their knowledge or consent, deprive them of that equity? The assignee taking no legal interest in the funds, could only take subject to the same equity to which the assignor was liable." Here the trustees were mortgagees, and had a right to retain the estate unsold in their hands, till the whole sum due to them was satisfied out of the rents and profits. They could have entered upon the premises immediately on the forfeiture of the bond; and in fact could have dealt with the estate as their own, until they had received satisfaction. If that be so, the produce of the estate must be dealt with in the same manner as the estate itself. They are, in fact, creditors having a security in their hands which they are entitled to retain, and the bankruptcy does not affect them. It is not necessary for them to call in aid the case of *Ex parte Turpin*; yet if that case, and *Ramsay v. Ramsay* (a), be taken into consideration, your Lordship will see no reason to doubt their authority.

Mr. *Simpkinson*, in reply.—It is impossible for the trustees to repudiate the bankruptcy. They have entered into various arrangements with the assignees in regard to the mortgage and otherwise, and cannot now be heard to say that the bankruptcy does not affect them. It is said that if the estate had not been sold, they might have had their remedy at any time against it. Now the form of

(a) Mont. 452, n.

this mortgage was such that they could only have foreclosed. [The *Lord Chief Baron*.—Suppose they had foreclosed, and the estate had only realized what it has realized under the present circumstances, they might still have resorted to their other remedies for compelling payment of the remainder.] After having sold the estate, they could not have proceeded on the bond, without opening the foreclosure. [The *Lord Chief Baron*.—Is there any case where a debtor having made a mortgage, the foreclosure is the only remedy?] They clearly could not have sold the estate in this case without foreclosure. The mortgage deed contained no power of sale.

1835.

SMITH
v.
SMITH.

THE LORD CHIEF BARON.—The decree evidently assumes throughout that the estate would produce the whole of the 15,000*l*. It turns out, however, from the sale that has been effected of the estate itself, that less than that sum has been produced. A question then comes before me, upon this petition, in consequence of that alteration of facts, or rather in consequence of a fact discovered since the decree was made, which was not suspected or imagined at the time it was made. I entertained some doubt whether I could modify in any shape that decree, or whether I could do anything with it in the shape of a petition. It appeared to me, at the outset, that this was rather a case for a supplemental bill, in the nature of a bill of review; but understanding that both parties were desirous to accommodate their proceedings to such opinion as I should give upon the point in difference between them, I undertook to do so, in order that they might, without any expense of a further proceeding, come to some arrangement.

May 12*th*.

I own, that, having considered the subject, which perhaps I ought to have been better prepared to decide in the first stage of the argument, it appears to me that the trustees in this case have a right to appropri-

1835.

SMITH
v.
SMITH.

ate the interest or the dividends arising from the sum realized by the sale of the estate, until such time as they have raised the full amount of the 15,000*l.* for which the estate was a security to them. The contest between the parties is, whether the trustees should be allowed to do that which would make Mr. *Smith's* interest sell for so much the less by the number of years dividends required to form that accumulation; or whether it is to be considered that the trustees have no title at all to any of the dividends during the life of Mr. *Maberly*; but that Mr. *Smith*, the assignee of those dividends, has a right to the whole. Now, in order to support the right of Mr. *Smith*, in which the assignees suppose that they are interested also in contending for, a case has been cited to me of *Stratton v. Hale* (a), (and there are other cases upon the same subject), in which the principle seems to have been adopted, that where the trustees of a marriage settlement have been allowed to prove as creditors under a commission of bankrupt, and have acquired dividends under that proof, those dividends stand in the place of the original sum, and the assignees of the bankrupt are entitled to the dividends during the life of the husband, in pursuance of the trusts of the settlement; and there are undoubtedly cases to that effect. On the other hand, those cases are said to have been overruled by a recent case of *Ex parte Turpin* (b), before the Court of Review. Now if this question depended entirely upon those cases, I own that I should be disposed to entertain some doubt whether that last decision was founded on a correct principle. At the same time, I wish only to express a doubt, because, in questions of this nature, where there are certain fluctuating principles of equity, that appear, when stated, very plausible, and to afford very reasonable grounds for a decision, it is much better, if that decision has once taken

(a) 2 Bro. C. C. 490.

(b) Mont. 443.

place, to adhere to it; because it then becomes a rule for the administration of property; and in a variety of cases where the question is more *positivi juris* than any thing else, it is much safer for property that the rule should be adhered to, than that it should be liable to fluctuation.

If the case were *res integra*, then I should be disposed, before I decided it myself, to hear a discussion upon a ground which was not taken in argument in the case of *Ex parte Turpin*, which is this:—A bankrupt under his commission is obliged to dispose of his effects by the power of an act of Parliament. It is the act of Parliament that places the dividends in lieu of the original debt, and absolves the bankrupt, if he conforms to the law, from all further claims. Now it is contended, that, in that case, the partial payment of the debt to the trustees still entitles them to claim as an equity against the assignees, in the same manner as they would against the bankrupt had he been solvent, the payment of the remainder of the debt, before they divide and give him any portion of the fund. As against the debtor, supposing him to be solvent, no doubt they would have a right to make that claim, because if he paid only a portion of the debt, and he proceeded to insist that they should give him the benefit of that portion, they would have a right to say, “how can you claim that of us, when you owe us a large sum in the shape of the balance of the principle due to us?” And whether they made that resistance in a Court of law (supposing a Court of law would entertain an action), or in a Court of equity, it appears to me the result would be the same; namely, that they should be allowed to claim that amount against any demand he might have under the settlement for interest or for dividends. But where a bankruptcy takes place, the bankrupt is placed in a different position; for by virtue of an act of Parliament, over which he has no control, his debts are all satisfied by the dividends which are paid under his commission. It is said,

1835.

SMITH
v.
SMITH.

1835.

SMITH
v.
SMITH.

however, in pursuance of the original argument, that the assignees can have no greater equities than the bankrupt, and that when they claim to have the dividends paid to them, they ought to be treated in the same manner as the bankrupt would be, if solvent. But the reply to that argument is, that the assignees owe nothing to the trustees. The trustees are permitted, by a very laudable practice, to come in as creditors, although there has been no actual advance of money. They are permitted, under peculiar circumstances, being trustees under the marriage settlement for the benefit of the wife and children, to stand in the place of creditors, and to receive the dividends in proportion to the security they have. But the assignees clearly are not bound to make them any other payment than the amount of the dividends, though the bankrupt would have been bound to do so, had he remained solvent. It is not perhaps, therefore, quite correct to say that the assignees are bound by the same equities as the bankrupt, because they are certainly not bound to pay any debt of the bankrupt in full. The case appears to me more to resemble that which I think it has not been likened to in any report I have seen, or any discussion I have heard, and upon which I should like to hear it argued, if I am called upon to decide it, namely, this:—Suppose an act of Parliament were to be passed, declaring that any particular individual should only pay 10s. in the pound of his debts; or suppose, which I hope will not happen, that a system of robbery and plunder should take place under the name of an equitable adjustment, and there should be an act of Parliament enabling us all to satisfy our debts by paying 10s. in the pound. Now put the case of a person having given a bond for 15,000*l.* to the trustees of his marriage settlement, would he not by authority of law satisfy that debt by paying 10s. in the pound? And could the trustees in that case say—“the law does not affect us, and therefore we shall not pay any dividend to

you upon this sum until the dividends are accumulated, so as to make up the whole 15,000%?" Now it appears to me a matter of very considerable and grave doubt, whether that could be maintained for the trustees; and I should think, if I had to decide the case of *Ex parte Turpin*, and other cases of the same nature, that at least that ground should be well sifted before I came to such a decision.

The case of *Ex parte Turpin* certainly does not stand alone. There are other cases, particularly that of *Ex parte Maister* (a), which bear upon the same point: and I observe that a learned Judge, to whose experience in matters of bankruptcy I pay great respect, is made to state that it has been the practice for a considerable time to allow trustees in such a case to accumulate the dividends until the whole debt is realized before any thing is paid to the assignees. I am therefore glad that I am not called upon in this case to make any decision upon the point which has been so much adverted to, because I do not conceive that the case of *Ex parte Turpin* governs the present case. Here a specific security was put into the hands of the trustees by law, and for the express purpose of paying the 15,000%. I ventured to ask the question in the progress of the argument, in what way a mortgagee would be treated, in case he had realized all that his real security or his pledge could give him, and, finding that to be insufficient, he had proceeded upon his bond or his covenant to recover the balance against the mortgagor; and I was told, by a gentleman of great experience, that according to the rules of a Court of equity, if a mortgagee resorted to his specific security, he in effect abandoned all further claim. That was certainly at variance with my pre-conceived notion. Nothing is a more common proceeding at law than for a mortgagee to take possession of

1835.

SMITH
v.
SMITH.

(a) Mont. 452, n.

1835.

SMITH
v.
SMITH.

the estate by ejectment; and, if he finds it inadequate for payment of his debt, to proceed upon the bond. Now I have looked at some references I had in early times to proceedings in Courts of equity, and I find that the very point was decided by my Lord *Thurlow*. It is not a point likely to occur frequently in Courts of equity, because lenders of money in general take especial care not to lend upon inadequate security. It did, however, occur in the case of *Tooke v. Hartley* (a), which was a remarkable case. There a man mortgaged a leasehold estate for 1600*l.*, and afterwards assigned his equity of redemption, and the assignee assigned again to another assignee. The

(a) 2 Bro. C. C. 126; 2 Dick. 785. Where the mortgagee has foreclosed, and the mortgaged premises are clearly not sufficient to satisfy the debt, a question has arisen, whether, either before or after sale of the premises, the mortgagee can be restrained from proceeding against the mortgagor on the bond or covenant. From the report of *Tooke v. Hartley* in Dickens, it would appear to have been Lord *Thurlow's* opinion, that, before sale of the premises, the mortgagee might be so restrained, "because by not knowing what the estate would produce, he could not say that any thing was due;" but that after a *bonâ fide* sale had taken place, the real deficiency would appear, and for that the mortgagee might bring his action. According, however, to Lord *Eldon's* recollection of the case of *Tooke v. Hartley*, Lord *Thurlow* made no distinction of this nature; holding that an action might be brought for the difference, whether the es-

tate was sold to a stranger, or remained in the possession of the mortgagee. See 8 Ves. 531. Upon the whole, it seems to be the better opinion, that though such an act on the part of the mortgagee opens the foreclosure, yet the Court will not in either case restrain him from proceeding for the difference. Eden on Injunctions, 37. In *Perry v. Barker*, 13 Ves. 198, Lord *Erskine* decided the other way; but his Lordship's judgment was founded in a great measure on the special circumstances of the case. See further in connexion with this subject, Powell on Mortgages, (edit. Coventry), 1002, n.; *Lyster v. Deland*, 1 Ves. J. 431; *Greenwood v. Taylor*, 1 Russ. & Myl. 185; *Davis v. Battine*, 2 Russ. & Myl. 76. As to the mortgagee resorting to his several remedies at the same time, see *Booth v. Booth*, 2 Atk. 343; *Burnell v. Martin*, 2 Doug. 417; *Colby v. Gibson*, 3 Smith, 516.

original mortgagor died; the mortgagee also died, and the executor of the mortgagee filed a bill against the last assignee to foreclose, and bring to a sale the estate; and it was sold for less than the mortgage money. He then brought an action upon the bond against the executor of the mortgagor; and upon that action being brought, a bill was filed by the defendant at law to procure an injunction, restraining him from proceeding in that action, and Lord *Thurlow* dismissed the bill. The question was pressed very much upon him. He said it was a new case, and if the parties were disposed to discuss it, and would bring the money into Court, he would allow them to do so; but without bringing the money into Court, he should dismiss the bill, for he stated, that he had no doubt at all upon the subject. Now that is a case exactly in point. It follows, therefore, applying that case to the present, that if the mortgagees—that is to say, the trustees—had taken all the means that were allowed them to realize their securities, and bring them to sale, and they had been found deficient, they might still have proceeded as creditors on the bond.

But it is not necessary even to go into that point to decide the present case. I consider that the mortgagees—in this case, the trustees—had a right by law to take possession of this estate. If they had a right by law to take possession of this estate by a proceeding in ejectment if Mr. *Maberly* would not deliver it up to them, what law is there, or what equity is there, to compel them to pay the rents and profits of that estate to Mr. *Maberly* during his lifetime, before they have raised the 15,000*l.*? If this, instead of being a mortgage, had been what is called by civilians a *vivum vadium*—not an absolute conveyance of the fee or the whole interest pledged, but merely to hold it until the debt was paid—it is quite clear they must have held it until they had received rents and profits enough to pay the debt. But take it as a mortgage;

1835.

SMITH
v.
SMITH.

1835.

SMITH
v.
SMITH.

which is an assignment of the whole interest with a proviso only, that, in case the mortgagor pays the whole debt, he shall be allowed in a Court of equity to redeem, it is clear that the mortgagor has no case at law; that it is only in equity that he can be allowed to redeem at all; and that if he attempted to redeem, a Court of equity would say, you cannot do so till you pay the whole debt; you must let the estate remain until the whole debt is paid by some means or other. Now I cannot conceive that the right of the mortgagee, which is so clear at law that it cannot be disturbed, and so clear in equity that the equity of redemption will not be allowed till the debt is fully paid, is to be affected by proceedings taking place here. The bankruptcy cannot affect that right at all, because it is paramount to the bankruptcy, and no intervening right in any other party can affect it. It stands as it stood before, both at law and in equity. In law the mortgagee has a full right to the whole of his mortgage money before he parts with the estate, and in equity the mortgagor cannot compel him to part with the estate till he has received the whole of the money. That being the case, if a Court of equity decrees the estate to be brought to a sale, for the purpose of satisfying any interest Mr. *Smith* might have, or for the general benefit of creditors, why should that prejudice the right which the mortgagees had both at law and in equity to payment of their full demand? Clearly, a Court of equity will say, that the produce of the estate stands bound by all the equities and all the claims by which the estate itself is bound.

It appears to me, therefore, in this case, without referring to the case of *Ex parte Maister*, and others of that class, that this is a case of a specific security for the purpose of raising a specific sum; that no proceeding in bankruptcy can affect the right of the trustees to have the benefit of that security to the full amount; that they have a right in equity to apply the money until the interest of the money or the dividends have produced the 15,000*l.*,

and that then, and not till then, will the right of the plaintiff attach upon him to receive the dividends upon that sum.

I may here add, that I also consider myself warranted in this decision by the case of *Priddy v. Rose*, referred to in the course of the argument. That case did not relate to real estate, but to a specific sum in the funds; and Sir *William Grant* entertained no doubt that the trustees had a right to hold that fund till they were paid what was due to them from the bankrupt before the bankrupt's creditors received any benefit from it. That case appears to me to be fully in point on the present occasion.

See *Smith v. Smith*, 2 Crompt. & Mees. 231.

1835.

SMITH
v.
SMITH.

CLARKE and Another v. RICHARDS.

May 9, 15, 20.

IN the year 1801, the plaintiff *Clarke* entered into partnership with the defendant in the business of attornies and solicitors, under the firm of *Clarke & Richards*. In *January*, 1811, they agreed with *John Tarrant*, who was then one of the four attornies or sworn clerks on the plea side of this Court, for the purchase of his business of attorney, the consideration for this purchase being, that *Clarke & Richards* should pay 700*l.* per annum to *Tarrant* for his life, and 400*l.* per annum to his wife *Elizabeth Tarrant* for her life, in case she survived him. *Tarrant* practised in all the

The office of sworn clerk of the Court of *Exchequer* is not abolished by any of the several statutes of 11 *Geo. 4* & 1 *Will. 4*, c. 58, 11 *Geo. 4* & 1 *Will. 4*, c. 70, and 2 & 3 *Will. 4*, c. 110. The object of the first-mentioned statute is to provide the means of paying the officers of the

various Courts of justice by salaries instead of fees; that of the second, to abolish the monopoly of attornies' business which existed on the plea side of the Court of *Exchequer*; and that of the third, to distribute the duties of the officers of that Court, and to give to them appropriate names.

The remuneration awarded to a sworn clerk of the Court of *Exchequer* under the provisions of the 11 *Geo. 4* & 1 *Will. 4*, c. 58, is not given as compensation for the loss of his monopoly of business as an attorney practising in that Court, nor even for the loss of his office of sworn clerk, that office not in fact being abolished; but it is given to him as a fixed salary for an office which he continues to hold, instead of a variable return of profits depending on casual fees.

Quære, whether a legal partnership could exist in the profits of the offices of sworn clerk or side clerk of the Court of *Exchequer*, as those offices were formerly constituted? or, whether such a partnership can at present exist in the profits of the office of clerk of the rules of that Court?

Where a personal office or employment is purchased with the partnership funds for the benefit of the partnership, the partner in whose name it is purchased is not necessarily a trustee of the profits of the office for the other partners, after the term of the partnership has expired.

1835.

CLARKE
v.
RICHARDS.

Courts of law and equity; but the proportion of the profits which he derived from each branch of practice was disputed by the parties to this suit. In pursuance of the above agreement, *Tarrant* by an indenture, dated the 1st of *January*, 1811, in consideration of the said several annuities, assigned to *Clarke & Richards* all that his business of attorney at law in the several Courts of *King's Bench*, *Common Pleas*, and *Exchequer*, at *Westminster*, and of solicitor in the High Court of *Chancery*, and his practice in conveyancing; and he covenanted that he would not at any time, either alone or in partnership, or as principal or agent, carry on the business of attorney or solicitor within twenty miles of *London*, but would diligently recommend the partnership of *Clarke & Richards* to his clients.

According to the usage of the Court of *Exchequer*, before the recent changes, no attorney could practise therein except in the name of one of the aforesaid four attornies or sworn clerks; or through the agency of the side clerks of their respective divisions, who had the privilege of using the names of the sworn clerks. It was usual for the side clerks to pay to the attorney in their respective divisions the fee of 300 guineas upon their appointment, and ten guineas annually. Upon the death of a sworn clerk, he was succeeded by the senior side clerk in his division: and if the sworn clerk had a son or *partner*, one of these persons succeeded to the vacant side clerk's place; the son, according to the defendant's statement, having the preference. Upon the death of a side clerk having a son or partner, the vacancy was filled up in the same manner. According, however, to the plaintiff's evidence, no preference was given to the son in these cases, except where he had been a partner with his father.

At the time when the above-mentioned agreement was entered into, one of the places of side clerk in *Tarrant's*

division was vacant, and the defendant was appointed to that office; and by an indenture dated the 4th of *January*, 1811, and made between *Tarrant* of the one part, and the defendant of the other part, *Tarrant*, in consideration of 300 guineas therein expressed to have been paid to him by the defendant, assigned to him the vacant side-seat in his (*Tarrant's*) division in the office of pleas in the Court of *Exchequer*, together with all the privileges and emoluments belonging to a side clerk in the said office; the defendant paying to him the yearly sum of ten guineas for the liberty of practising in his name.

The circumstances attending the appointment of the defendant as side clerk were disputed by the parties. The plaintiff alleged, and, to some extent, gave evidence of an agreement or understanding between the plaintiff *Clarke* and the defendant, that as they could not be jointly named as side clerk, and as the former attended to a different department of the business, the latter should hold the office. On the other hand, the defendant denied that he became entitled to the place under any such arrangement, alleging that it had been granted by *Tarrant* to him alone; and that the connexion with *Tarrant* having been originally brought about by his means, he had insisted that he should be appointed side clerk in preference to the plaintiff *Clarke*.

Soon after the execution of the assignments, *Tarrant* died, leaving his wife surviving him, and was succeeded in his office by *Benjamin Price*, the senior side clerk of his division.

The partnership firm of *Clarke & Richards* continued till the year 1818, when the plaintiff *Medcalfe* was introduced into the firm. Upon that occasion an indenture of partnership was executed between the plaintiffs and the defendant, bearing date the 24th of *January*, 1818, by which they agreed to become partners in the profession of solicitors in equity, attornies at law, conveyancers, and

1835.

CLARKE
v.
RICHARDS.

1835.

CLARKE
v.
RICHARDS.

agents, for the term of twenty-one years, in the respective shares and proportions therein mentioned. The deed also, amongst other provisions, contained the following:—That upon the expiration or sooner determination of the partnership, except by death, a general account should be taken of the partnership debts and effects, and that a division of them should be made between the partners according to their respective shares, and that they should give mutual bonds to secure the payment by each partner of his share of the debts due from the firm, and execute mutual assignments to secure to each partner his share of the debts due to the firm. That upon the death of any of the partners within the term, his share should be secured to his executors in manner mentioned in the deed; and that if the plaintiff *Clarke*, or the defendant, should so die (and, as to the defendant, notwithstanding he might have retired from the said co-partnership under the provision thereafter contained), then, and in such case, the surviving partner or partners should deliver to the executors of the deceased, a bond securing to those executors an annuity of 300*l.* from the time of such death to the expiration of the said twenty-one years. That in case of the death of the plaintiff *Clarke*, or the defendant, or the resignation of the defendant, during the term as thereafter mentioned, the surviving or continuing partner or partners should pay to *Elizabeth Tarrant* her annuity of 400*l.* That it should be lawful for the defendant to retire from the co-partnership at the end of the first or any other year of the said term, upon giving six calendar months' notice in writing of his intention to the other partners; and that, thereupon, his share of the subsequent profits should go to the continuing partners, and that the money due to him should be accounted for and paid in the same manner and proportion as if he had departed this life, or as near thereto as circumstances would permit; yet, nevertheless, he was not, while living, to be entitled to receive the annuity of 300*l.*, which, in case of his death, would be pay-

able to his executors; but that the continuing partners should execute a bond for securing to him, for his life, an annuity equal to one-third of his share of the partnership profits.

In November, 1820, *Benjamin Price*, who succeeded *Tarrant* in the office of sworn clerk, died, and was succeeded in that office by the defendant, who was then the senior side clerk in that division.

The fee of 300 guineas, which *Tarrant* received upon the admission of the defendant as side clerk, was paid by the plaintiff *Clarke* and the defendant, out of their partnership funds. The annual sum of ten guineas, which, according to custom, was payable in respect of the defendant's place as side clerk to the sworn clerk of his division, was likewise, during the time that he held that situation, regularly paid out of the partnership funds. Both the sum of 300 guineas and the annual sum of ten guineas were considered by the parties as partnership property, and so treated in the partnership accounts. When the defendant became a sworn clerk, the annual sums of ten guineas, which he received from the side clerks of his division, were regularly carried to the partnership account, and entered in the partnership books, as property belonging to the partnership; and the several fees of 300 guineas which he received, were divided between him and the plaintiffs in the same proportions as the partnership profits were divided.

By stat. 11 *Geo. 4* & 1 *Will. 4*, c. 58, s. 1, it was enacted, that every person who on the 24th of *May*, 1830, should have held any office in any of the superior Courts of common law, in fee, or for life, or years, should make out and render to the commissioners to be appointed by virtue of that act, an account in writing of all fees and emoluments which would have become due in respect of such office, and of all disbursements, allowances, and charges affecting the same, in each of the ten years preceeding the said 24th of *May*, 1830. By the 5th and 6th

1835.

CLARKE
v.
RICHARDS.

1835.

CLARKE
v.
RICHARDS.

sections of that act, the commissioners were to ascertain the gross and net annual value of such fees and emoluments according to the fair average of the said ten years, and they were to certify the same to the Lords Commissioners of his Majesty's Treasury. By the 8th, 10th, and 11th sections, every person who, on the 24th of *May*, 1830, should have held any such office or employment as aforesaid, should, during his continuance therein, render to the Lord High Treasurer or the Commissioners of the Treasury, upon oath, a true account in writing of the gross and net amount of all such fees and emoluments as should become due on account of such office or employment; and in case such net amount should exceed the net annual value thereof which should have been certified as aforesaid, the surplus should be paid into the receipt of the *Exchequer* to the credit of the consolidated fund; and in case such net amount should fall short of the net annual value which should have been certified as aforesaid, every such person should be entitled to receive the full amount of the difference out of the consolidated fund. By the 16th section it was enacted, that in case any such office or employment as aforesaid should be abolished, every person who would be entitled to the difference between the net amount of the fees and emoluments and the certified value of the office in case it were not abolished, should be entitled to receive during all the time for which such person was entitled to hold the said office so abolished, such annual sum as the Lord High Treasurer, or any three of the Commissioners of the Treasury, and the Lord Chief Justice or Lord Chief Baron of the Court to which such office or employment might belong, should, under certain restrictions, fix and appoint as a full and fair compensation for the loss of the same.

By stat. 11 *Geo.* 4 & 1 *Will.* 4, c. 70, s. 10, which commenced and took effect on the 12th of *October*, 1830,

it was enacted, that all persons admitted to practise as attornies in the Courts of *King's Bench* and *Common Pleas* might in like manner be admitted to practise as attornies on the plea side of the Court of *Exchequer*, without being obliged to employ any of the sworn or side clerks as their attorney; and the Barons were thereby required to distinguish by their rules and orders the fees which should continue to be taken by the sworn and side clerks for their duties performed as officers of the Court, from such fees as should be allowed to be taken by the attornies so admitted to practise.

By stat. 2 & 3 *Will.* 4, c. 110, sects. 1, 2, and 3, reciting, amongst other things, that *Stephen Richards*, (the defendant), and the four other persons therein named, were the five principal acting officers on the plea side of the Court of *Exchequer*, it was enacted, that there should continue to be five principal officers on that side of the Court; and that the said *Stephen Richards* should in future perform the duties of the clerk of the rules, and the other persons therein named should perform the duties of other offices in the said Court, and thereby particularized; and such officers were to hold their offices during good behaviour, and they were prohibited from acting as attornies, solicitors, or agents, from and after the 2nd day of *Easter Term*, 1833. By the 10th section, it was enacted, that the said five officers should receive, by way of salary, such annual sum as the Lord Chief Baron and the other Barons of the Court of *Exchequer*, with the approbation of the Treasury, should think proper, to commence from the 12th day of *October*, 1830: such salaries to be retained and paid out of the fees by law payable in respect of the duties performed by the officers of the common law side of the said Court; and the surplus of such fees, after deducting expenses, to be accounted for and paid into the Treasury. And any sum which might be awarded to the said officers by the commissioners, under the 11 *Geo.* 4

1835.

CLARKE
v.
RICHARDS.

1835.

CLARKE
v.
RICHARDS,

& 1 *Will.* 4, c. 58, was to be taken into consideration in fixing and ascertaining their said respective salaries.

On the 20th of *September*, 1832, the defendant caused a notice of that date to be served on the plaintiffs, by which, after reciting his appointment as clerk of the rules under the last-mentioned act, and that by virtue of that act he would be disabled from acting as an attorney from the 2nd day of *Easter* Term following, he gave the plaintiffs notice that he should retire from the partnership existing between him and the plaintiffs under the indenture of 24th of *January*, 1818, on the first day of the said *Easter* Term, or sooner, if agreed upon; and should cause his name to be erased from the rolls of attorneys of the *King's Bench* and *Common Pleas*, reserving to himself all such rights and advantages to which he might be entitled under and by virtue of the said articles of partnership.

Previous to this notice, the defendant, in pursuance of the regulations of the stat. 11 *Geo.* 4 & 1 *Will.* 4, c. 58, had laid before the commissioners appointed under that act an account of the profits and emoluments of his office as sworn clerk for the ten years next preceding the 24th of *May*, 1830, which account was made out and stated from the partnership books. After taking these accounts into consideration, the commissioners certified to the Lords of the Treasury, that the yearly sum of 1370*l.* was a proper sum to be awarded to the defendant under the provisions of that act. This annual sum was accordingly received by the defendant, and the aggregate amount of it from the 5th of *November*, 1830, to the 15th of *April*, 1833, the time of the dissolution of the partnership, was 3500*l.* In addition to this annual sum of 1370*l.*, the further annual sum of 500*l.* was settled upon the defendant, under the provisions of the 2 & 3 *Will.* 4, c. 110, s. 10, in order to make up an adequate salary for him as clerk of the rules.

The plaintiffs filed the present bill against the defendant,

1835.

CLARKE
v.
RICHARDS.

stating most of the foregoing facts, and charging that the partnership between them and the defendant was put an end to by his voluntary act, and in a manner inconsistent with the partnership articles: insisting also that the defendant having for some years devoted his time exclusively to the business of the office, and having been excused from transacting the ordinary business of the firm, his partners are entitled to the benefit of his labours in that respect, more especially, as, pending the inquiry before the commissioners, in which he alone was engaged, he represented that he was prosecuting his claim for compensation for the benefit of the copartnership. That though the sum awarded to the defendant was awarded as compensation for an abolished office, yet the plaintiffs, under the circumstances, are entitled to have the aforesaid sum of 3500*l.*, being the amount of the compensation accrued before the termination of the said partnership, and also so much of the said salary as accrued during the existence of the said partnership, considered as part of the present joint monies of the said concern, and to have the same divided between all the partners, in proportion to their shares in the said partnership. That the aforesaid yearly compensation of 1370*l.* to be received by the defendant at the Treasury for the future, during the term of his life, belongs to the plaintiffs, as the continuing partners in the said concern, and as an indemnity for the loss sustained by the abolition of the said partnership office. That the defendant is and will be a trustee for the plaintiffs of the said yearly compensation, for the time to come; but the plaintiffs are willing that the yearly sums to be received by the defendant for the time to come, by way of salary for the said office of clerk of the rules, should, under the circumstances, be considered to belong to him.

The bill prayed for a general account of the partnership dealings, and that it may be declared that the said sum of 3500*l.*, and also the salary that accrued due during

1835.

CLARKE
v.
RICHARDS.

the late partnership, form part of the monies and effects thereof; and that the plaintiffs, as the continuing partners, are entitled to the aforesaid yearly compensation of 1370*l.* for the time to come, during the life of the said defendant; and that he may be declared a trustee thereof for the plaintiffs.

The defendant, by his answer, denied that the partnership was terminated by his voluntary act; contending, that it was entirely the result of the acts of Parliament. He admitted that the commissioners under the 11 *Geo.* 4 & 1 *Will.* 4, c. 58, had certified to the Lords of the Treasury that the yearly sum of 1370*l.* would be a fair compensation to the defendant for the loss sustained by the abolition of his office. He also admitted that the plaintiffs were entitled to have the sum of 3500*l.*, or any other sum due for compensation between the 5th of *November*, 1830, and the 16th *April*, 1833, considered as part of the present monies of the partnership; but he denied that the aforesaid yearly compensation of 1370*l.*, or any other sum to be thereafter received by him at the Treasury, during the term of his life, or any part thereof, belonged to the plaintiffs as the continuing partners, or by any other right whatever, or that any person, save the defendant, had any right therein; or that the office which had been abolished was a partnership office; or that the salary of the clerk of the rules, or any part thereof, belonged to the plaintiffs; or that he, the defendant, ought to be a trustee for the plaintiffs of the said compensation and salary, or either of them, since the termination of the partnership.

In his answer to the amended bill, the defendant insisted that the act of 2 & 3 *Will.* 4, c. 110, did not abolish the office of sworn clerk of the *Exchequer*, which was held by the defendant before the passing of that act; and that notwithstanding that act, the defendant was still one of the sworn clerks in the said Court, and was liable to the performance of the duties thereof.

The cause now came on for hearing, both upon the pleadings and the evidence. It was stated by some of the witnesses for the defendant, that the office of sworn clerk was not a saleable or assignable office; and that the office of side clerk was no further saleable than as related to the fee of 300 guineas, payable upon the appointment of each side clerk.

1835.
CLARKE
v.
RICHARDS.

Mr. *Simpkinson*, Mr. *Wakefield*, and Mr. *Cooper*, for the plaintiffs.—The defendant having by his own act rendered it impossible that the partnership should be continued, the partnership property must be divided amongst the partners, according to their respective interests, and the business must go to the continuing partners. Now the compensation, which is the subject of this suit, was awarded to the defendant before the determination of the partnership, in respect of business in which the partners were jointly interested; it must, therefore, be distributed amongst the partners precisely as any other partnership property; and the circumstance of its being payable by instalments, can make no difference. The notice of retirement given by the defendant to his copartners was not a valid notice within the terms of the articles: the partnership must, therefore, be considered as having been dissolved by one of the parties in a manner not contemplated by the articles, or as having terminated by effluxion of time, or by a new agreement between the parties. Supposing the partnership to have expired by effluxion of time, what would have become of the office? At law the defendant would have continued to hold it; but in the absence of all agreement upon the subject, could it be contended in equity that what had been bought with the partnership money should wholly belong to the defendant? If the partners could not perform the duties jointly, would not the party for whose life the office was tenable act for the benefit of them all? And must

1835.

CLARKE
v.
RICHARDS.

he not in such case have paid his former partners a proportion of his emoluments? Here a trust is created of the office, by the circumstance that it was bought with the partnership money, and that its profits were dealt with as partnership emoluments. Moreover, the assignment of *Tarrant's* business to the firm of *Clarke & Richards*, amounts to a declaration of trust on the part of the latter, that he holds the office for the benefit of the partnership; for the assignment is useless; unless it has reference to the subsequent instrument of the 4th of *January*, 1811. Whether, therefore, we look to the origin of the office, or the manner of dealing with it, it is clear from the understanding of the parties, independent of any general rules of equity, that the defendant held the office in trust for the partnership, and he cannot withdraw from this trust. [The *Lord Chief Baron*.—There seems considerable difficulty in it. Suppose there had been no acts of Parliament, and the partnership had expired by effluxion of time, and the defendant had remained in the execution of his office, what right would the other partners have had to any part of the profits? The profits arise from his personal labour.] There would be no impossibility in holding him to be a trustee in such a case. Here, however, it is clear, that whatever might be the trouble of the office, the defendant undertook it. There is nothing in the agreement which shews what the limit of the trust is to be. [The *Lord Chief Baron*.—The true question is, not whether, if it be a trust, a Court of equity would not deal with it, notwithstanding the difficulty; but whether in fact it be a trust prolonged after the expiration of the partnership. Is it not a question of evidence, as to whether the trust was intended to be so prolonged?] The parties having assigned no limit to the trust by the articles of partnership, it must be presumed to continue for the benefit of all the partners. If by words they had limited the trust to the duration of the partnership, then,

1835.

CLARKE
v.
RICHARDS.

however disadvantageous to some of them such a stipulation might appear, yet the Court would say that they were free agents in the matter, and might have had their motives for giving the defendant the greater share of the benefit. That, however, is not the case here. The extent of the trust is not defined by any deed, it is not the subject of any written agreement, and, consequently, in the absence of any evidence to the contrary, the parties must be considered as interested in the profits of the office in proportion to their respective interests in the partnership. Had the intention of the parties been otherwise, the defendant would have taken care to see that his interests were expressly provided for; when the parties entered into the new partnership in 1818, he would have secured this office for himself or his son, in the event of a dissolution. A prudent man would have come to a definite understanding upon such an important point. So far from that having been the case, the subject is not even mentioned in the partnership articles; on the contrary, the profits of the office are dealt with precisely in the same manner after 1818 as before, being uniformly carried to the general partnership account, and divided amongst the partners. It is, therefore, for the defendant to shew, that, upon the expiration of the partnership term, he alone would have been entitled to the beneficial interest in this office.

There is another argument, which, supposing the office in question to have been the proper subject of a trust, seems fatal to the defendant's claim. In case of his retirement from the partnership with notice, he was by the terms of the articles entitled to an annuity to be paid to him by the continuing partners, equal to one-third of his former profits as a partner. Now suppose that the notice which he gave to his copartners had been a valid notice, or suppose that he had retired upon due notice, and afterwards the office had been abolished, could it have been

1835.

CLARKE
v.
RICHARDS.

contended on the one hand that the fund from which he was to take his annuity was thereby destroyed, or on the other hand that he was entitled to take both the annuity and compensation? Yet one of these results must arise, if the defendant's view of the case be adopted.

It will be contended that the office of sworn clerk, or side clerk, was not a saleable or assignable office, and that the profits of it could not be the subject of partnership dealings. But in *Ellis v. Walmesly* (a), the office of side clerk in the *Exchequer* was expressly included in the terms of a partnership deed, made between *Gorton*, *Walmesly*, and others. Upon the construction of that deed, the Master of the Rolls held that the annuity, which was granted by way of compensation for the loss of the profits of the office, was to go to the partners during the partnership term, and afterwards to belong to *Gorton* and *Walmesly* jointly. It has always been the practice for sworn clerks, as well as side clerks, to have partners who share their profits. What has been done for a long course of years, is evidence of the law in that respect: and the cases in *Salkeld* (b) shew that a person holding an office may agree to share the profits of it with a deputy, notwithstanding the 5 & 6 Ed. 6, c. 17. The office of sworn clerk is analogous to that of attorney in the *King's Bench* or *Common Pleas*. Before the practice of an attorney or solicitor was known, a party could only by licence of the crown sue a defendant in the name of another (c). This was long ago found to be a hardship, and it gradually became the custom for suits to be conducted by attornies. In the reign of *Hen. 6*, the number of these persons became so great, that it was limited by act of Parliament. This restriction was lost sight of, and is now obsolete in the *King's Bench* and *Common Pleas*, but not so in the

(a) Rolls, 16 Feb. 1835.

Id. 468.

(b) *Gulliford v. De Cardonell*,
2 Salk. 466; *Godolphin v. Tudor*,

(c) 3 Bl. Comm. 24.

Exchequer. From some cause or other, which is lost in the obscurity of time, there continued to be only four attornies in this Court, though, as the business of the Court increased, side clerks were appointed. In *Burton's Exchequer Practice* (a), it is said that "the four under clerks or attornies (whenever a vacancy happens to be), are supplied out of the sixteen side clerks, and are nominated by the chief clerk or master of the office, and approved of by the Barons." It appears, therefore, that they must be approved in the same manner as an attorney or solicitor is approved; and it is clear, from this and the other observations on the subject in Mr. *Burton's* book, that the office both of the sworn clerk and the side clerk was on the same footing as that of attorney; and the modern usage is, not to take persons as side clerks, except they have been admitted as attornies. Now though the business of an attorney cannot be sold or assigned to an unqualified person, yet, as regards profits, it may be made the subject of partnership with an unqualified person, notwithstanding the statute (b). The contract in *Bunn v. Guy* (c) was analogous to the contract in this case. [The *Lord Chief Baron*.—My difficulty is, how I am to hold that, under the circumstances of this case, a trust of the profits of this office is raised for the benefit of the partnership during the life of Mr. *Richards*. Suppose three or four persons were to enter into partnership as bankers for a term of years, and one of them were to be admitted a stock-broker at the expense of the partnership, for the purpose of investing the partnership money in the funds; would he, when the term of the partnership had expired, be obliged to be a stock-broker for the benefit of the partnership for the rest of his life?]

1835.
CLARKE
v.
RICHARDS.

The *Attorney-General*, Mr. *Knight*, and Mr. *G. Richards*, for the defendant.—This is an unconscionable de-

(a) Vol. 1, p. 11. (b) Stat. 22 Geo. 2, c. 46. (c) 4 East, 190.

1835.

CLARKE
v.
RICHARDS.

mand. The remaining partners, who file the present bill, are placed in a far better situation by the acts of Parliament than the defendant himself. They contend that the partnership has been dissolved by the act of the defendant; on the contrary, it was dissolved by the *vis major* of the legislature; not by consent of the defendant, but in spite of him. The 2 & 3 *Will.* 4, c. 110, s. 3, dissolves this partnership; and if the legislature declares that the profits of the office shall be applied in a certain manner, that will overrule all the supposed previous equities attaching to those profits. It is contended, however, that the office in question is abolished, and that the plaintiffs are entitled to share so much at least of the defendant's salary as consists of compensation for the abolished office, namely, the annual sum of 1370*l.* But in *Stokes v. White*-(a), it was expressly decided that the office of side clerk is not abolished by any of the recent statutes; and what the plaintiffs call compensation is no more than the regulated salary to which the defendant is entitled under the stat. 11 *Geo.* 4 & 1 *Will.* 4, c. 58, instead of the casual profits which were received before that act. The 1st, 5th, 6th, and other sections at the commencement of that act, relate to offices which continue; the 16th relates to offices which may at any future time be abolished. With respect to continuing offices, the 5th and 6th sections enact, that the commissioners shall ascertain the annual value of each office, according to a certain average, and certify such value to the Lords of the Treasury. By other sections, it is enacted, that every person holding such office shall account upon oath for the fees which he receives; and that if they exceed the certified value, the surplus shall be paid into the Treasury, and if they fall short of that value, the difference shall be paid to the holder of the office out of the consolidated fund. Now the sum certi-

(a) 1 Cr. M. & R. 223; 4 Tyr. 786.

fied by the commissioners in respect of the defendant's office was 1370*l. per annum*. Under the subsequent stat. 2 & 3 *Will.* 4, c. 110, which regulates the duties of the officers of the Court of *Exchequer*, the Chief Baron and the other Barons were to fix the salary of such officers; and in so doing, were to take into consideration the sums awarded to them by the former act. In estimating the salary of the defendant, the Barons took into their consideration the 1370*l. per annum* which had been already awarded to him, and then allowed him 500*l. per annum* in addition. Now it is clear that these two sums stand precisely on the same footing. The plaintiffs, it is true, set up no claim to the latter sum; but there is no principle calling upon them to relinquish the 500*l. per annum*, which does not equally call upon them to relinquish the whole. The whole constitutes the modified salary of a continuing office. It is not a compensation for any thing that is gone; it is an annual payment issuing out of fees payable in respect of an office still going on, and for which both skill and integrity are required. The 11 *Geo.* 4 & 1 *Will.* 4, c. 70, recognizes the continuance of the office by separating the fee of the attorney from the fee of the officer.

The office, therefore, not having been abolished, and not being saleable or assignable, it follows that what the plaintiffs seek is the payment to them from time to time of a portion of the fees of this office, by virtue of a contract entered into between them and the defendant. Suppose, for the sake of argument, that there ever was such a contract; we deny its legality. What was the nature of the office when the contract is alleged to have taken place? It could only be held by an admitted attorney; it was connected with the administration of justice, and had important duties attached to it; it was in the gift of the clerk of the rules, and under the control of the Court; and in the due performance of it the Court, the suitors, and the public were all interested. To hold that such an

1835.

CLARKE
v.
RICHARDS.

1835.

CLARKE
v.
RICHARDS.

office can be made the subject of contract, is contrary to every principle of law, and, with the exception of one case, is at variance with all the authorities. In a single instance, that of *Bellamy v. Burrow* (a), the contrary position is supported by the high authority of Lord *Talbot*, who reversed the decree of Sir *Joseph Jekyl* upon that point. His Lordship's judgment, however, is but a bare decision, not a reasoned judgment; nor does he at all enter into the question of the severance of the duties and profits of an office which was so cogently urged by Sir *Joseph Jekyl*. With this exception, the authorities are all the other way, the policy of the law being, that the duties of an office of this nature shall not be separated from its emoluments: *Law v. Law* (b); *Hanington v. Du Chatel* (c); *Lidderdale v. Duke of Montrose* (d); *Garforth v. Fearon* (e); *Hartwell v. Hartwell* (f); *Ex parte Curtis* (g); *Osborne v. Williams* (h); *Waldo v. Martin* (i). All the reasoning of Lord *Loughborough*, in *Garforth v. Fearon*, applies as well to equitable as legal contracts; and all the decisions accord with the doctrine there laid down. In *Palmer v. Bate* (k), the assignment by a clerk of the peace of the profits of his office to trustees for the benefit of his creditors, was held to be invalid. [The *Lord Chief Baron*.—That was a strong case, because by act of Parliament the clerk of the peace may appoint a deputy.] In *Comyn's Digest*, where the older cases on the subject of offices are collected (l), it is laid down that an office of trust cannot be assigned without the consent

(a) Ca. T. T. 97.

(b) 3 P. W. 391; Ca. T. T. 140.

(c) 1 Bro. C. C. 124.

(d) 4 T. R. 248.

(e) 1 H. Bl. 327.

(f) 4 Ves. 811.

(g) 4 Ves. 814, cited by Romilly.

(h) 13 Ves. 379

(i) 4 B. & C. 119; 6 D. & R. 219.

(k) 6 Moore, 28; 2 Brod. & Bing. 673.

(l) Com. Dig. Officer, (C.), (D. 2).

1835.

CLARKE
v.
RICHARDS.

of him who granted the office. This was an office of trust in the gift of the clerk of the pleas; and the question is, whether a Court of justice can now sever the emoluments from the duties of that office, by reason of a contract. By so doing, the Court may leave it to be administered by an individual who has no interest in the due performance of it, and who may delegate it to others for the purpose of extortion. Can the Court so deal with an office, in which skill, personal character, and respectability are concerned? If the defendant could declare himself by contract a holder of any part of the emoluments for the benefit of another, he might do the same by the whole. The plaintiffs call upon your Lordship to say that this officer shall perform the functions of his office at an insufficient salary, or it may be with no salary at all—in short, to deal with an office not assignable in ignorance of the person who conducts it. The clerk of the pleas was not bound to take the defendant as a sworn clerk: he might in strictness have chosen any of the side clerks for that purpose; but he selected the defendant for his personal skill. According, however, to the argument of the plaintiffs, he selected him in ignorance that he had bound himself by a contract with others. This is against the policy of the law, and against the authorities.

These observations, we submit, would have been applicable, even if the contract on which the plaintiffs rely had actually taken place. But in truth there was no such contract; or if it ever was made, the plaintiffs have not proved it. They who undertake to shew that any thing illegal has been done, must prove even a negative: *Williams v. East India Company* (a). Now the plaintiffs call upon the Court to presume an illegal contract. Another point is, that when parties put any part of their agreement in writing, they shall be held constructively to have put

(a) 3 East, 193.

1835.

CLARKE
v.
RICHARDS.

their entire agreement in writing. That rule is settled in equity, as well as at law. Its application has been relaxed in the case of a defendant resisting a bill for specific performance; but an agreement cannot be decreed to be performed, which is partly in writing and partly not. Here, partnership articles are cautiously prepared between professional men; and those articles are entirely silent on the subject in dispute. Can it be said that on mere inference you are to add to the agreement so material a term as this? Their whole case proceeds on an assumption not warranted by authority—namely, that in all cases of payment a contract or trust is raised by implication in favour of the payer. Now in regard to that point, *Crop v. Norton* (a) bears upon the present case. There, it was held, that though in general payment by one for a thing acquired in the name of another would raise a resulting trust in favour of the individual paying, yet where there were other considerations which were difficult or impossible to value, in the absence of any express contract, there was no implied contract in the payer's favour: that, in such a case, the Court might apply the trust as well to one consideration as another, and being, therefore, in the dark upon the subject, could not deal with it at all. It is true that Lord *Hardwicke's* language in that case has, in point of extent, been misunderstood; but the principle upon which he proceeded stands unimpeached: *Wray v. Steele* (b). Now here it is clear, that the 300 guineas was not the consideration for the office, supposing that the office was assigned. There were a variety of other considerations, which it is impossible to estimate. In point of fact, however, *Tarrant* never assigned the office, though he attempted to do so, and though by the contract he lost all the benefit of the office, except what arose from the side clerk's premiums.

(a) 9 Mod. 233; 2 Atk. 74.

(b) 2 Ves. & B. 388.

As to the annuity which the defendant was to have upon his retirement, it is clear, upon the construction of the articles, that it was to be calculated with reference to the profits which he relinquished, that is, the profits arising in the usual course of the business of the firm as attornies. It is not necessary, however, to consider that question, because not one of the causes of dissolution contemplated by the articles has taken place; and the plaintiffs cannot apply the equities which they might otherwise insist upon, to an event not contemplated by the articles. This is a *casus omissus* by the parties; their rights are affected by positive law, and must be regarded almost in the same manner as those of the testator's next of kin, where they take the property undisposed of by his will.

1835.
 CLARKE
 v.
 RICHARDS.

Mr. *Simpkinson*, in reply.—The defendant by his answer does not raise the question of the illegality of the contract, but relies upon the acts of Parliament, and the violent disruption of the partnership against his will. It has been argued on his behalf, on strict technical distinctions drawn from the acts of Parliament, that the office was not abolished, and that compensation was not given; and that, in fact, the Judges having awarded the compensation by mistake, the defendant is entitled to retain it. Now the office was only a monopoly of the business on the law side of the Court of *Exchequer*. The business of it was carried on by four sworn attornies and sixteen other persons, called side clerks. In other respects, there was no difference between them and other attornies. The moment that monopoly was destroyed, which it was by law, all benefit of it fell to the ground. Under the 16th section of 11 *Geo. 4* & 1 *Will. 4*, c. 58, compensation was claimed and awarded. It was received and paid as compensation, and is admitted by the defendant in his answer to have been awarded in respect of the abolition of his office; and he cannot say that the plaintiffs are not entitled to a share

1835.

CLARKE
v.
RICHARDS.

of it. But then it is said that there is another act, which imposes on the defendant the necessity of acting in the Court of *Exchequer*—that he has no choice upon the subject—that, in short, he is compelled to accept the office against his will, and that he is placed in a less advantageous situation than he was before. Now, it is quite clear that he acted in it for some time voluntarily; but, at all events, if he thought the partnership more beneficial, he might have repudiated the office. There is nothing in any of the acts of Parliament which prevented him from resuming the business of attorney, after relinquishing the office. In truth, there was no such violent disruption of the partnership. Admitting that it was dissolved in a manner not contemplated by the articles, yet it was dissolved by act of the party, and the compensation awarded by the Barons became distributable among the partners. It is contended, that under the 2 & 3 *Will.* 4, c. 100, s. 10, the compensation was reconverted into salary, for the benefit of the defendant, the 500*l.* *per annum* being merely a completion or addition to it. That is not the case: the compensation and salary are totally distinct things. No doubt the Barons, in fixing the salary, were to take into their view the amount of compensation already awarded; but they could not make it part of the salary.

But it is said, that if any agreement existed for sharing the profits of this office, it was clearly illegal. No doubt that would be so, if the office were one connected with the administration of justice within the statute of *Edw.* 6. But it was not of that nature, it was only a monopoly of the business of attorney in the *Exchequer*, and, therefore, not distinguishable as the subject of contract from the business of any other attorney. This appears not only from the nature of the duties of the office, but from the stat. of 22 *Geo.* 2, c. 46, which places attornies under certain regulations, and exempts from these regulations attornies or clerks of the several offices in the *Exchequer*,

thereby treating them as ordinary attornies. That being so, the law as to attornies in general applies to their case. Now it is clear that a contract for the sale of the good will of an attorney is valid: *Bunn v. Guy* (a). And with respect to partnerships between attornies, they are held to be so strictly binding, that they cannot be dissolved as against a client who objects to the dissolution: *Cooke v. Rhodes* (b). And an agreement by an attorney to pay a share of the profits to another person who is not an attorney, is legal, notwithstanding the statute 22 Geo. 2, c. 46: *Candler v. Candler* (c); *Armstrong v. Lewis* (d). Here, however, the parties were competent to contract the relation of partners as attornies. In 1801, they became partners. They afterwards purchased *Tarrant's* business as an attorney, which included his monopoly of business in the Court of *Exchequer*. At the same time, and in connexion with this purchase, the defendant was appointed to be side clerk in *Tarrant's* division. That situation was purchased with the partnership funds, and the fees of it were carried over to the partnership profits. It is clear, therefore, that the office in question was purchased for the benefit of the partnership, and formed part of the monopoly; and that, although the compensation was awarded to the defendant alone, yet it was awarded to him only as the nominal possessor of the office.

1835.

CLARKE
v.
RICHARDS.

The LORD CHIEF BARON.—This was a bill filed by Messrs. *Clarke & Medcalfe*, against Mr. *Richards*, their former partner, praying for an account of the partnership dealings, and a settlement of the partnership affairs. The question raised by the bill relates to a claim made by the plaintiffs, either for the whole or some part of the salary which Mr. *Richards* now possesses under the order of the

May 20th.

(a) 4 East, 190.

(b) 19 Ves. 273.

(c) Jacob, 255.

(d) 2 Crompt. & Mees. 274.

1835.

CLARKE
v.
RICHARDS.

commissioners, who have fixed his salary as a sworn clerk of the Court of *Exchequer*, and under the order of the Barons, who have made some addition to his salary. It is insisted by the bill, that Mr. *Richards's* situation of sworn clerk was part of the subject of the partnership, that all profits derived from that situation are the subject of joint interest between himself and his partners, and that the present salary being but a substitution for that in which the partners had a joint interest, they are entitled either by express covenants, or a necessary equity arising from the covenants in their articles of partnership, to a participation in those emoluments. I regret that this question should have arisen between gentlemen of such well-known respectability, and that it should have fallen to my lot to decide a controversy so much better fitted to be settled by some friendly tribunal. As, however, I have been pressed to do so, I feel that I have no means of avoiding that duty, and therefore I have bestowed great pains and attention upon the subject.

The question has been elaborately and ably argued on both sides. It seems to me to depend mainly on two considerations: first, what was the nature of the office of sworn clerk in Court, or attorney of the Court of *Exchequer*; and secondly, how far the partnership articles, either expressly or by implication, involve the mere profits of the office in the partnership concern. Now the office of sworn clerk in the *Exchequer* has been established for ages; it is probably as old as the Court itself, and has been expressly proved to have existed by name since the time of *Edw. 1.* Upon an inquiry, however, into the nature of the office, it is not necessary to trace its existence to so very early a date. Its duties and rights are so well understood, that it would be pedantic to seek for its origin now; suffice it to say, that the officers called the clerk of the pleas, and the sworn clerks, were the ancient common law officers belonging to the Court of *Exchequer*, because

that Court, as every body knows, incidentally to their power of administering justice between the king's debtors and others, acquired a common law jurisdiction.

Now the duties of sworn clerk and side clerk in the Court of *Exchequer* have been very well defined and understood. Part of these duties consisted in being entering clerks for the purpose of making out writs, entering up judgments, and transacting various matters which in other Courts of law were transacted by officers having more appropriate names. In this respect their labours were the same as those of the prothonotary, the clerk of the rules, the clerk of the papers, and other officers in other Courts of justice; but connected with, though perhaps not necessarily dependent on those duties, they had also the privilege of acting as attornies, and were indeed the only attornies by whom the King's suitors in this Court had a right to be heard or represented. Probably the original jurisdiction of the Court of *Exchequer* at common law was so trifling as not to require a larger establishment; but, however that may be, the Court recognised no other attornies but these, and directed that all proceedings requiring the intervention of an attorney should be conducted here by one of these four persons, or some side clerk in their names. This undoubtedly gave to these four attornies in the course of time a considerable monopoly of practice; but to me it is very obvious that their duties as entering clerks, which they perform in behalf of the Court, are not to be confounded with the duties which they owe to their clients as attornies conducting suits. It happens by the constitution of the Court, that the attornies who conducted the suits were the same persons as the officers of the Court; but their duties are distinguishable, and ought not to be confounded together.

Now, see what was the effect of the acts of Parliament on the several orders and rights of the officers. In 1830, an act was passed called the 11 *Geo. 4* & 1 *Will. 4*, c. 58,

1835.

CLARKE

v.

RICHARDS.

1835.

CLARKE
v.
RICHARDS.

which was enacted, not for the purpose of abolishing, nor does it abolish any office: the policy of that statute was to provide the means of paying the officers of the different Courts of justice by salaries instead of fees. Whatever might be the advantage of one mode of payment or the other, that was the policy of the act. It was thought, I presume, that an interest in the amount of the fees was found to present considerable difficulty in the way of reforms, and, therefore, that the emoluments of the officers ought to be wholly independent of the fees, in order to prevent a perpetuation of abuses. Therefore the act appointed commissioners for inquiring into the fees and emoluments of the several officers, and enacted that the officers should lay an account before the commissioners of all the fees which they had received for the last ten years previous to a certain date. That was to be the basis of an average calculation of what their salaries were to be in future, and that period of ten years was fixed upon with much consideration. The act then provides, that when those sums were ascertained, the commissioners should report to the Treasury what was the annual value of each office calculated on that basis. The officers were to receive the fees as before, but instead of appropriating them to themselves, they were to pay them into a common fund, and from that fund they were each to take such portion as the commissioners should fix. If there was any surplus, that was to be paid into the *Exchequer* to the credit of the consolidated fund; and if there was any deficiency, that was to be paid to the respective officers out of the consolidated fund. These clauses were not intended to abolish, and in no case can they have the effect of abolishing, any office. The meaning of the act was, to convert into salary what had previously depended on casual fees. It was not intended as a relief to the public, but to prevent any obstacle in the way of any improvement which might afterwards be made in the constitution of the Court.

When that act passed, another was in progress through the House of Commons: namely, the 11 *Geo. 4 & 1 Will.* 4, c. 70. That act proposed to throw open the monopoly of the Court of *Exchequer*, by allowing other attornies in the several Courts of law to be admitted there, and to have the benefit of practising there in their own names. That act, as might be expected, produced some sensation amongst the officers of the Court of *Exchequer*; and I wish to explain the nature and history of a particular clause in that act which was noticed in the course of the argument. By the 10th section it will be found, that the Barons are directed to investigate and ascertain what proportion of the emoluments of the sworn clerks and of the side clerks was derived from their fees for the performance of their duties as officers of the Court, and to distinguish those fees from the profits which they received as attornies. The reason of that was, that those emoluments to which they had a right as officers of the Court might be more easily made subject to the regulations of the former act. I had the honour of introducing the latter act myself. Feeling, as I was bound to do, anxious to attend to every interest, I had a communication with the sworn clerks and side clerks of this Court. A representation was made to me at the time, that the official and the attorney's fees were so mixed up and undefined, from the long monopoly that had existed, that it would be very difficult for the commissioners to make the distinction, unless they could, from some authority, know what those fees were; and that the commissioners might think, that, as attornies' fees, to examine into them would not be within their jurisdiction. Undoubtedly a struggle was at the same time made to preserve the monopoly, but I well remember that the answer I made was this—"What you will lose by the abolition of the monopoly will be made up to you by the increased fees arising from the increased business consequent on the destruction of the monopoly." It was with

1835.

CLARKE
v.
RICHARDS.

1835.

CLARKE
v.
RICHARDS.

a view then to that distinction that the 10th section was introduced. I am now given to understand that it has not been acted upon by the Barons (a); but, if this be so, I must presume that the commissioners had some other means of obtaining the same information; because I do not see how they could inquire into the fees of attornies. They could inquire into the fees of the officers of the Court, but not into the fees charged by them as attornies to their clients. However, the result has been, that the sworn clerks did attend before the commissioners. The commissioners investigated the amount of their respective fees for ten years, according to the provisions of the 11 Geo. 4 & 1 Will. 4, c. 58, and they fixed the amount of Mr. Richards' salary at 1370*l. per annum*. Did they by this proceeding abolish his office? The statute of 11 Geo. 4 & 1 Will. 4, c. 70, abolished the monopoly of the attornies' business undoubtedly, but it still left the sworn clerks to do their duty as officers of the Court. It was necessary that there should be some clerks to make out the judicial writs, to enter up judgments, and transact other business of the Court, and who were to do this but the sworn clerks? They remained the only persons under obligation and with authority to do these things, and for that they had a right to receive a remuneration calculated upon the ten years' profits in the manner prescribed by the acts.

But it is obvious that there had been a communion of business amongst these officers, resulting from their duties not being sufficiently distributed and defined, inasmuch as they all did all the duties of the various offices; so that each was a filacer, a clerk of the rules, and a clerk of the papers, and a clerk of the judgments, and there was no distinction between them. That gave rise to the statute of 2 & 3 Will. 4, c. 110. Did that act abolish the

(a) This was a mistake; it was acted upon.

sworn clerks? No. It gave then new names and distributed their duties. It recites, that there were five principal officers of the Court, and proceeds to enact, that they shall now be known by certain definite appellations. Three are to be prothonotaries, one is to be clerk of the rules, and one is to be filacer. The clerk of the pleas is no longer to exist; that is a sinecure, and is abolished by the act; but the others are described and named; and as the Barons were to fix their salaries, the act provides that those salaries shall be fixed with reference to the remuneration which might be awarded by the commissioners. The act might have been silent on the subject; but it had been thought expedient to refer the matter to the Barons, qualified by that direction, in order, I presume, to prevent the possibility of giving to the sworn clerk his whole salary in conjunction with what he already enjoyed. The consequence was, in the case of Mr. *Richards*, that though the Barons recommended that the salary of the clerk of the rules should be 1000*l. per annum*, yet, in consequence of his salary having been already settled at 1300*l. per annum* by the commissioners, he was to have only 500*l. per annum* in addition to that sum. This, however, gave him 500*l. per annum* in addition to the salary which the commissioners had settled that he ought to possess.

On review of these several statutes, it must clearly be considered that the salary which the sworn clerk now enjoys is not any portion of what he before derived from the emoluments of his practice as an attorney, but is confined to what he received as sworn clerk. It has been suggested, that, for the calculation of the profits of the office, the commissioners received a statement of his general profits as an attorney. If they did, and the Barons omitted to perform the duty imposed on them of distinguishing the nature of the different fees which were received, I can only say that I must presume the commissioners at least did their duty, and made that distinction

1835.

CLARKE
&
RICHARDS.

1835.

CLARKE
v.
RICHARDS.

which the Barons ought to have made. It was indeed the duty of the commissioners to do this, even if no such clause as the 10th section of the 11 *Geo.* 4 & 1 *Will.* 4, c. 70, existed; because they were to receive the accounts of the fees of these officers, *quà* officers only, and not as attornies. It became then imperative upon them to adopt the best means they possessed of making the distinction themselves; and I conceive that if they could find no other means, or if the Barons could not furnish them with any previous directions, they had an obvious line of duty to pursue; namely, to look to the other Courts of justice for examples. The fee which the clerk of the rules receives is not an attorney's fee, but that of the clerk of the rules; and if no rule had been made in the Court of *Exchequer* for that purpose, it was their duty to resort to such other means as I have mentioned; and to ascertain what was payable to the filacers and other officers who performed similar duties in the other Courts. Whether they did that, I have no means of knowing, but I must presume they did their duty; and that the 1300*l.* was not awarded to Mr. *Richards* as compensation for the loss of the monopoly of his business of attorney, but in lieu of fees which he ceased to appropriate to himself; but which he put, in pursuance of the act, into a common fund. I think, therefore, on this bill, that Mr. *Richards*' office is not abolished; that the compensation in question has not been received by him in his character of attorney, but in lieu of the fees which he was before accustomed to receive as a clerk of the Court. It is true, from a statement in his first answer, Mr. *Richards* appears to think that the remuneration which he received was compensation for the abolition of the office. I was surprised at that statement; but it is qualified; for he says in effect, that he did not receive compensation for any thing but the office; and, in his second answer, he altogether denies that the office was abolished.

Supposing that I am right in this opinion (and I pro-

nounce it with some hesitation), I now proceed to the second question, which it is necessary to consider; namely, how far the profits of this office are involved in the partnership interest. Now, if Mr. *Richards* had received the sum in question as compensation for the abolition of a monopoly, which monopoly he had communicated to the other gentlemen, I think it quite clear that it ought to be taken to be compensation as well to them as to him. But the question is, whether the partnership articles, or any proceedings founded on the partnership articles, justify the conclusion that they meant to ensure to themselves any interest in the profits of his situation as sworn clerk.

It appears to me, that if the partnership articles had involved that question, it would be necessary to consider whether those profits might be communicated by assignment; but before that question arises, it is fit to inquire whether they were actually assigned. Now, Mr. *Tarrant* being a sworn clerk in the *Exchequer*, Messrs. *Clarke & Richards* made a proposal to him to purchase his business as an attorney. *Tarrant* accordingly agreed, in consideration of 700*l. per annum* to be paid to himself and 400*l. per annum* to be paid to his wife, to assign to them that business. Now, looking at the statement in the bill and to the assignment, I do not find that the assignment of *Tarrant's* fees as sworn attorney formed any distinct part of that instrument. By the assignment, *Tarrant* engaged not to act as an attorney within twenty miles of *London*, and he assigned all the good-will of his business for twenty-one years. Suppose his clients had said to *Tarrant*, “ You have assigned away your business to *Clarke & Richards*, but we do not choose to employ them, we will pay you off, and take our papers from your office.” I wish to ask—as Messrs. *Clarke & Richards* could have done nothing to prevent this, but would still have been under the obligation of paying *Tarrant* 700*l. per annum*—what would have become of *Tarrant's* duties as sworn

1835.

CLARKE
&
RICHARDS.

1835.

CLARKE
v.
RICHARDS.

clerk in such a case? Would he not have been obliged to attend and perform those duties? It is clear he thought so; for his first act was to take to his own use 300 guineas for the purchase of the situation of side clerk. He also received the 10 guineas a year additional, or at all events he would have received them if he had lived; for it is to be presumed, that what he did as to the 300 guineas, he would have done as to the rest.

Supposing, again, Mr. *Tarrant* had said to Messrs. *Clarke & Richards* under these circumstances, "I am sorry that you have lost your business, but I have done my best for you—I have assigned to you the goodwill of my business, and nothing is left to me but the annuity and the emoluments as side clerk—no client will employ me—my name is never used—and all the business I formerly had is yours." Would they have had a right to say to him, "You shall pay us the fees of 10 guineas a year which the side clerks pay upon their admission?" To dispose of that question, let us look at the assignment. It contains nothing to warrant the assumption of such a right. It simply states the contract for the sale of the business of an attorney from *Tarrant* to *Richards*; and, it is clear, that the parties did not contemplate any thing more. If they had, the 300 guineas paid by *Richards* would not have been paid to *Tarrant* only. Either it would not have been paid at all, or would have been paid by *Richards* to the partnership. It is clear that the parties did not act as if the assignment had given them an interest in *Tarrant's* emoluments as sworn clerk.

However, Mr. *Richards* was, about the date of the assignment, admitted a side clerk, upon payment of this fee to *Tarrant*, and acquired a right to use *Tarrant's* name in conducting the business of his office; and that continued till 1810, when Mr. *Medcalfe* became a partner. Now, if we look at the articles entered into on that occasion, there is no such expression contained in them as

that of sworn clerk. True, it is stated that all the emoluments which *Richards* received in that character were carried to the partnership account. But that was a mere personal matter, and cannot be binding to the extent contended for. If the deed contained very ambiguous words, perhaps that circumstance might be taken into consideration; but, looking at the articles, I do not find that the emoluments of side clerk are contained in them at all. These are articles between attornies. They are like any other articles of that nature; and by them the partners brought into a common stock the emoluments of their practice for twenty-one years. But it is said, that Mr. *Richards* has brought into the common accounts this salary. If he did so, I presume he did it on a notion that his office was abolished, and that he received compensation for the loss of the monopoly as attorney. Acting upon that notion, he was right in what he did; for whatever he received as compensation for his monopoly, he must have dealt with upon that principle. I think he was mistaken in his opinion, if that was his opinion; but it is not necessary to go into that subject now.

The question comes to this, whether or not these articles, which were articles of partnership between attornies for twenty-one years for the purpose of dividing the emoluments of their practice between them, of necessity embraced the official emoluments of any one of them as sworn clerk. Suppose that one of several attornies entering into partnership is steward of a manor, from which he derives a considerable part of his practice. He acquires from that practice emoluments which he would be bound to communicate to the partnership. But supposing the partnership to be dissolved, would he still be bound to communicate to the partnership the profits which he might receive as steward? But still it is said that upon the connexion of Mr. *Richards* with the partnership, his situation of side clerk was purchased with the partnership

1835.

CLARKE
v.
RICHARDS.

1835.

CLARKE
v.
RICHARDS.

money; and, therefore, if capable of being purchased, it was like the purchase of a lease or any thing else producing a clear profit, and must consequently be taken in equity to have been purchased for the benefit of the partnership; and that if this was a lease for Mr. *Richards*' life, and the rents and profits of it were divided among the partners, the conclusion would be inevitable, that it was taken for the purpose of a partnership in those profits, and must be made the subject of partnership division. I agree to that proposition in the general; but then I must see clearly that the intention was to purchase an office of this kind for the life of the party. At the time he was admitted, the partnership was to continue for the remainder of a term of twenty-one years. Why then should I infer that because the office was purchased with the partnership money, the partnership in the office was intended to last during the life of Mr. *Richards*? I put the case, during the discussion, of a banker's firm, and one of the partners in it a stockbroker, whose licence is purchased with the partnership money; does it follow that he is to play the part of stockbroker for the benefit of the partnership for the rest of his life? In such a case it would be a sufficient consideration for the partnership to advance the money, that by possibility the partnership might last long enough to be repaid the sum laid out. I should not be bound to presume, when the partnership ceased, that they held the profits of that situation for the life of another, merely because that one partner who held it might possibly hold it for that time. Now, suppose in this case that the partnership had expired by effluxion of time, would any of the partners have a right to say to their co-partner who held the office, "The partnership is at an end, but you must still divide the profits of your office with me—I may go where I please, but you are a sworn clerk of the Court of *Exchequer*, and must remain to perform your duties—I claim, as a purchaser, an equal

interest with you in the profits of your office; and, if you refuse, I shall compel you to perform the duties of it for the remainder of your life; for if I have not a right to your future fees as attorney, still I have a right to share the fees of your office as long as you live?" I think it is impossible that the parties could have contemplated such a result.

It appears to me, that the purchase of the office with the partnership money by no means involves the consequence that it was partnership property. If it did involve that consequence, then the question would arise as to the legality of so dealing with the office; but, under the circumstances of the case, that question does not arise. Then, inasmuch as it appears to me that the profits which are the subject of this suit are not received as a compensation for the loss of a monopoly of the profits of an attorney, but as an official salary only; and, inasmuch as they were not included in the partnership articles, and are not, for the other reasons which I have mentioned, to be considered as partnership property, I am of opinion that I must make a decree in favour of the defendant.

1835.
CLARKE
v.
RICHARDS.

JOHN WHITE, Plaintiff;
NATHANIEL GARDNER, JOHN STEVENS, and WILLIAM
INNES BAKER, clerk, Defendants.

May 11, 16, 18.

THE bill was filed by the equitable lessee of the rectorial tithes of the parish of *Lashborough*, praying against

Agreement to lease the rectorial tithes of a parish, including the tithes of

90 acres supposed to be within the parish, but which had not paid tithes to the lessor during his incumbency, with a stipulation that the intended lessee would, within a given time, take such legal proceedings for the recovery of the tithes of the 90 acres as his counsel should advise:—*Held*, not to be within the Statute of Maintenance.

Where an equitable lessee of tithes, having a right to call for the conveyance to him of the legal interest, had neglected to do so previously to instituting a suit for the recovery of part of those tithes, and upon the refusal of the rector to join as co-plaintiff in the suit, had made him a co-defendant:—*Held*, that he was not entitled to the costs arising from the rector's refusal to join, and that the rector was entitled to his costs.

1835.

WHITE
v.
GARDNER.

the two first-named defendants, who were executors of one *William Gardner*, an account of tithes in respect of an off-going crop upon 80 acres of land within that parish, and praying that the other defendant, the rector, might be directed to pay to the plaintiff all such costs and charges as the plaintiff had or should be put to in the prosecution of the suit, in consequence of his refusal to be joined as a co-plaintiff.

The bill stated that the plaintiff had, by virtue of annual demises (which appeared on the hearing to be parol demises) of the tithes in question, from the defendant *W. I. Baker*, entered into the perception and receipt thereof, or of the greater part thereof, from *Michaelmas*, 1824, down to *Michaelmas*, 1827, at which time the said *W. I. Baker* agreed to lease such tithes to the plaintiff for a period of three years. That a memorandum in writing was signed and executed by the said *W. I. Baker* and the plaintiff for that purpose, dated the 2nd of *February*, 1828, whereby the said *W. I. Baker* agreed with the plaintiff, that he by a good and sufficient indenture of lease would demise and let to the plaintiff all and every the rectorial tithes and glebe lands of and belonging to the said rectory of *Lashborough*, including as well the tithes of about 90 acres of land, supposed to be within the said parish, which had not since the incumbency of the said *W. I. Baker* paid to him any tithes or compensation for the same, as also all the glebe lands which were supposed to belong to the said rectory, and which for many years past had not been enjoyed by the rectors of the said parish, for the term of three years from *Michaelmas* then last, if he the said *W. I. Baker* should so long live and continue rector of *Lashborough*, at the yearly rent therein mentioned.

The agreement contained a stipulation, which did not appear in the bill, that the intended lessee should covenant to commence and prosecute within six months, if so

advised by counsel, all proper and necessary legal proceedings for the recovery of the tithes of the 90 acres of land, and also for the recovery of certain glebe lands alleged to belong to the rectory, but which were in the possession of Lord *Ducie*.

The bill alleged, that the plaintiff was advised that the said *W. I. Baker* was a necessary party to the suit, and that the plaintiff had in various ways requested him to allow his name to be used as a co-plaintiff; which the said *W. I. Baker* having refused to do, it became necessary to make him a defendant.

The defendants, *Gardner* and *Stevens*, by their answer to the original bill, submitted, that if any such demises as in the bill alleged were made to the plaintiff, or any such agreement as therein alleged was entered into, the said plaintiff did not thereby acquire any legal right or title, and did not, under the said alleged demises, acquire any right or title whatever to the said tithes; and that he was not competent to sue for the same, or any of them, in this Court. By their answer to the amended bill, they alleged that if any such demises or leases were made, it was not stated, nor did it appear that the same were made in writing; and they submitted to the judgment of the Court, whether the said plaintiff became, or was by virtue thereof entitled (and they did not know that he was otherwise entitled,) to the payment of tithes from all occupants in the parish of *Lashborough*.

The defendant *W. I. Baker*, by his answer, admitted the contract between him and the plaintiff, as stated in the bill, and that applications had been made to him, though not till after the filing of the bill, to allow his name to be used as a co-plaintiff. He stated that he had offered to accede to those applications, in case the plaintiff would give him a full and sufficient indemnity against the consequences of his becoming such co-plaintiff, and also in case the plaintiff would pay and discharge the arrears of rent

1835.

WHITE
v.
GARDNER.

1835.
 WHITE
 v.
 GARDNER.

which had become and were due to the defendant from the plaintiff under the aforesaid contract or agreement for the said tithes. He added, that inasmuch as the plaintiff was, at the time of making such applications, indebted to him, the defendant, in a considerable sum, he was unwilling to incur a liability on behalf of the plaintiff, whilst the latter refused or neglected to perform the agreement. He alleged that he was at all times ready and willing, and had offered to concur in any receipt or discharge for the tithes now sought to be recovered ; and, therefore, he submitted that his being made a party to the suit was wholly unnecessary and vexatious, more especially as he was advised that the plaintiff was competent alone to recover and give effectual discharges for what was sought by the said bill to be recovered. Wherefore he denied that he ought to pay to the plaintiff the costs demanded of him by the bill.

Mr. *Simpkinson* and Mr. *Macdougall*, for the plaintiff. —The defendants, the executors, contend, that although the rector is a party to the suit, yet the plaintiff is incompetent to sue. On the other hand, the rector contends that the plaintiff might sue alone ; that to make him, the rector, a party, is unnecessary and vexatious, and that he ought not to be compelled to pay the plaintiff the costs which the latter seeks by his bill. Both these defences are untenable. The rector is a necessary party ; but being made a party, the equitable lessee may sue : *Henning v. Willis* (a); *Jackson v. Benson* (b); *Williams v. Jones* (c). Whether the party legally entitled to the tithes is made a co-plaintiff or a co-defendant, is immaterial. In *Jackson v. Benson*, the Court allowed the plaintiff to amend his bill, by making Lord *Lonsdale*, the improper rector, a party ; but the allowance to amend did not specify whe-

(a) 2 Gwill. 898 ; 2 E. & Y.
188.

(b) M'Clel. 62 ; 3 E. & Y. 1121.
 (c) 1 Younge, 252.

ther Lord *Lonsdale* should be made a plaintiff or a defendant; and it is clear that by either mode any objection for want of parties would be obviated. Then as the rector is a proper and necessary party to the bill, the plaintiff must be allowed the costs which he has incurred in consequence of the rector not consenting to be made a plaintiff except on terms. He had no right to make such terms. Under the agreement, there was an implied contract that the plaintiff should be at liberty to use the rector's name.

1835.
WHITE
v.
GARDNER.

Mr. *Wilbraham* for the defendants, the executors of *Gardner*.—It may be conceded that the rector being made a party, no objection to the suit can be sustained, on the ground that the plaintiff is merely an equitable lessee of the tithes. But admitting a part of the tithes claimed by the bill to be due to the plaintiff under the annual demises, he has, at all events, no legal claim to the remainder, the agreement under which the remainder is alleged to be due being void under the Statute of Maintenance (a). The rector cannot, without possession, take upon himself to let the tithes of the 90 acres to the plaintiff; nor can the plaintiff enter into a covenant to take legal proceedings for the purposes mentioned in the agreement. The agreement is one and entire; not a separate demise of one part and of another part. It is an agreement to demise the whole of the tithes, part of which have not been for years in the rector's possession. This is fatal to the plaintiff's whole case as regards the tithes claimed under the agreement.

Mr. *Bethell* for the defendant, the rector.—The plaintiff was not entitled to call upon the rector to join him as a co-plaintiff; he is, therefore, not entitled to the costs

(a) 32 Hen. 8, c. 9.

1835.

WHITE
v.
GARDNER.

which he prays by his bill. Where there is an express trust, the person having the equitable interest may generally call on his trustee to join him in a suit relating to the trust property. But there was no express trust between this defendant and the plaintiff. All that the defendant has done is to enter into a written agreement to grant the plaintiff a lease. This, no doubt, confers on the plaintiff an equitable interest, but it raises no trust of such a nature as to compel the defendant to join with him in a suit. The plaintiff ought to have called upon the defendant to grant him a lease. The agreement to grant the lease might have been carried into effect the next day. It is from the plaintiff's own laches that he stands in his present situation. [*Alderson*, B.—All that he has been guilty of is the taking an equitable instead of a legal interest. Could the defendant refuse to join on that ground alone?] He could insist upon being paid his costs. You cannot compel a man, upon a mere indemnity, to join you in a Chancery suit. [*Alderson*, B.—The defendant professed to give the plaintiff a present interest, with a prospect of a future lease; but by taking this course he is not giving him the full benefit of his present interest. Why should the plaintiff be compelled to take the more expensive mode of suing?] It is the result of the plaintiff's own act. Besides, the defendant was willing to join as plaintiff upon having a full and sufficient indemnity.

Mr. *Simpkinson*, in reply.—With respect to the objection raised by the two first defendants, it is clear that this case has nothing to do with the Statute of Maintenance. The object of that statute was to prevent a person from selling that of which he was not in the possession. Now, the rector in that character was entitled to all the rectorial tithes. The agreement was for a lease, not of the tithes of any particular tract of land, but of all the tithes, both great and small, of the rectory. Then, the mere non-

perception of a portion of them cannot operate as a total disseisin of the rector. It is impossible that an agreement to lease all the rectorial tithes, where some have not been paid, should be within the statute.

1835.
 WHITE
 v.
 GARDNER.

In reply to the argument of the rector, it is to be observed, that no lease, if it had been immediately executed, could have given the plaintiff a legal right in the by-gone tithes. The plaintiff was satisfied with the implied contract, which always takes place in cases of this nature, which was to have the use of the assignor's name to recover the tithes in the usual manner. If he had refused to lend his name, the plaintiff might have filed a bill to compel him to institute a suit; but the practice is, upon a refusal of this nature, to make the party a co-defendant. It is said, that the defendant refused to be a plaintiff, because he could not have a full and sufficient indemnity; but he claims, by his answer, what he has no right to claim, namely, arrears of rent.

ALDERSON, B.—The question with regard to the two *May 18th.* first defendants is, whether the plaintiff fulfils the character of equitable lessee of the tithes of the rectory of *Lashborough*; because it is quite clear, from the authorities, that, if he does fulfil that character, he, having made the lessor a defendant, has a right to the account which he seeks by his bill. Now, it is said, that he is not so entitled, by reason of the agreement between him and his lessor, the rector, falling within the provisions of the Statute of Maintenance. It appears that, for some years, the plaintiff held the tithes of Mr. *Baker*, the rector, by parol; but that in *February*, 1828, *Baker* came to a written arrangement with him to this effect—that he, *Baker*, would, by a good and sufficient indenture of lease, demise to the plaintiff all the rectorial tithes and glebe lands of the rectory of *Lashborough*, including the tithes of ninety acres of land which had not paid tithes during the rector's

1835.

WHITE
v.
GARDNER.

incumbency, and also all the glebe lands which were supposed to belong to the rectory, and which for many years had not been enjoyed by the rector. The term for which the lease was to be granted was for three years from *Michaelmas* preceding the date of the agreement; and then there is a covenant that the plaintiff shall within six months after the commencement of the lease, if so advised by counsel, commence and prosecute legal proceedings against the occupiers of the ninety acres of land for the tithes of those lands, and also against Lord *Ducie* for the recovery of the glebe lands in his possession. It is said that this agreement falls within the Statute of Maintenance, inasmuch as it is not a mere agreement for a demise of all the glebe lands and rectorial tithes, but of certain tithes and glebe lands of which the lessor was not in possession; upon a covenant that the lessee should sue for the recovery of those tithes and lands. But it does not appear to me to fall within the provisions of that statute; for, in the first place, it does not appear from any statement in the bill that the rector was out of possession of the tithes of those lands. He must be considered as being rightfully in possession of the tithes of all lands within the parish. He lets all the tithes; and all that is stated is, that he has not received tithes of those ninety acres. But that may be by reason either of a composition, or of neglect on the part of the rector to receive or enforce the payment of them. It does not follow from the circumstance stated that he is out of possession of them; he being in possession of them generally. Besides which, all that the lessee undertakes to do, is to bring such actions for the recovery of those tithes and lands as his counsel shall advise. It is, therefore, not to be presumed that he will be advised to bring any actions which by law he is not entitled to bring. In addition to this, the observation in *Co. Litt.* 369. b., seems applicable to the present case. It is there said, that “the words of the statute being *any pretended right*, therefore

a lease for years is within the statute. But yet, if a man make a lease for years to another, to the intent to try the title *in ejectione firmæ*, that is out of the statute, because it is in a kind of course of law; but if it be made to a great man, or any other, to sway or countenance the cause, that is within the statute." Upon the whole, therefore, it appears to me that this agreement is not within the statute, and that the right of the plaintiff to the tithes for the away-going crop being in other respects established, he is entitled to a decree.

It was contended on the part of the plaintiff, that the defendant *Baker* ought to pay him the costs which he had been put to in making *Baker* a defendant instead of a plaintiff. On the other hand, it was contended, that being made a defendant solely for the purpose of establishing the plaintiff's claim, *Baker* must be paid his costs. Now, it appears to me, that the question depends on this consideration—whether there was any agreement expressed or implied between *Baker* and *White*, that *Baker* should permit the use of his name as co-plaintiff. If there was any such agreement either expressed or necessarily implied, then *White* is entitled to succeed; but if there was no such agreement, then *Baker* is entitled to his costs of being brought before the Court. Now, it is clear to me, that there was no express understanding on the part of *Baker* to permit his name to be used, nor any necessary implication to that effect; because all that the agreement amounts to is, that *Baker* will, at the request of *White*, execute to him a legal instrument, giving him a legal claim. It was *White's* fault that he did not get the agreement put into a legal shape before he commenced the suit. If he had so done, there would have been no necessity for making *Baker* a party at all. If he had not so done, but had made his claim upon *Baker* to execute the lease, and that claim had been neglected or refused, then he would have been entitled to place *Baker* in the situation

1835.

WHITE
v.
GARDNER.

1835.
 WHITE
 v.
 GARDNER.

of plaintiff. Further, if he had entered into this agreement, and there was no other mode of obtaining redress, then there would have been a necessary implication that *Baker* agreed to be made a plaintiff. But when I find that by the practice of Courts of equity he may obtain redress by making the rector either plaintiff or defendant, this appears to me to put an end to any necessary implication, that, under such an agreement as this, the rector was bound to lend his name as a plaintiff. Therefore I think that, though the defendant *Baker* has not altogether put his refusal to join in the suit on the right ground, because he seeks for a further payment from the plaintiff beyond the indemnity; yet, as he has not necessarily agreed to permit his name to be used as co-plaintiff, he is entitled to his costs.

May 29th,
 June 15th.

ESDAILE and Others v. LA NAUZE and HEYLAND.

Where a bill of exchange has been negotiated by means of a forgery of the name of the payee as indorser, a Court of equity will restrain even a *bond fide* holder of the bill from suing the acceptor, and will direct the forged instrument to be delivered up to be cancelled.

Where the original indorsement of the payee's

name on a bill of exchange is a forgery, a real indorsement by the payee, after the bill has arrived at maturity, will not give the holder any title.

A power of attorney giving the agent full powers as to the management of certain specified real property, with general words extending those powers to all the property of the principal of every description, and, in conclusion, authorizing the agent to do all lawful acts concerning all the principal's business and affairs of what nature or kind soever, does not authorize the agent to indorse bills of exchange in the name of his principal.

LANGFORD HEYLAND, Esq., by a power of attorney, dated the 27th of *August*, 1830, authorized *Robert Hitchcock* to oversee, let, manage, and improve his several estates in *Ireland*, specifying them by name, and every other property belonging to him, wheresoever situate, or of whatsoever description, or howsoever called or known; and for the purposes aforesaid, in the name of his principal, to execute agreements and leases, to receive and distrain for rents, to give acquittances of every description, and to bring actions and suits at his discretion for the recovery of rents, or any other debt, duty, matter, or thing due or coming to his principal for or in respect of

the premises, or in any other respect whatever. “ And, in my name, to give, and further to do all lawful acts and things whatsoever concerning all my business and affairs of what nature or kind soever in the said United Kingdom; and generally to act for me and on my behalf in all matters as fully and amply in all respects as I might or could do therein, were I personally present and had done the same.”

In pursuance of this power of attorney, *Hitchcock* became the manager and receiver of *Heyland's* estates in *Ireland*; and in the course of his dealings in that character, he was in the habit of making remittances to *Heyland* by bills of exchange, drawn by *St. George Gregg & Co.*, bankers at *Dublin*, upon and accepted by the plaintiffs, who are bankers in *London*. He was also, as such agent, in the habit of making lodgments of money with *Gregg & Co.*; but at the time when the bill in question in this cause was drawn, *Gregg & Co.* had no effects in their hands belonging either to *Heyland* or to his agents.

In *March*, 1832, *Hitchcock* sent *Gregg & Co.* a letter containing a banker's cheque for 500*l.*, drawn upon the *Coleraine* branch of the provincial bank of *Ireland*, accompanied with a request, that, in consideration of such cheque, *Gregg & Co.* would draw a bill on *London* for the sum of 500*l.* in favour of *Heyland*. Accordingly, in compliance with that request, *Gregg & Co.* drew a bill of exchange for 500*l.* upon the plaintiffs, dated the 10th of *March*, 1832, payable to *Heyland*, or his order, at sixty-one days after sight, which they delivered to *Hitchcock's* clerk, retaining in their hands the cheque drawn upon the *Coleraine* bank.

Immediately upon the receipt of the bill, *Hitchcock* indorsed it in the name of *Heyland* to one *Stewart*, who, on the 12th of *March*, sold it to the defendant, *La Nause*, a bill broker, for 492*l.*, and afterwards left the country. It was

1835.

ESDAILE

v.
LA NAUZE.

1835.
ESDAILE
v.
LA NAUZE.

admitted that *La Nauze* had no notice of the fraud. Upon the purchase of the bill, he immediately sent it to the plaintiffs for acceptance, and they accordingly accepted and returned it.

Upon presentment of the cheque for 500*l.* for payment at the *Coleraine* bank, payment was refused, and it was then found that the cheque was a nullity, and that *Hitchcock* had absconded to *America*. In *April*, 1832, *Gregg & Co.* became bankrupt, being indebted to the plaintiffs in a large balance over and above the amount of the bill.

After the bill arrived at maturity, which was on the 17th of *May*, the defendant, *La Nauze*, was for the first time apprized of the fraud. Having failed in his applications to the plaintiffs to pay the bill, he was advised to get the bill indorsed in reality by *Heyland*, who, during the whole of these transactions, was abroad. *Heyland* accordingly did so, in consideration of being paid one-half of the amount of the sum to be received upon the bill. *La Nauze* then brought his action against the plaintiffs to recover the amount; and the present bill was, consequently, filed against him and *Heyland* (who was still out of the jurisdiction), praying to have the bill delivered up to be cancelled, and for an injunction to restrain the action.

The plaintiffs having obtained an injunction to restrain the action at law, that injunction was, after argument before Lord *Lyndhurst*, continued to the hearing.

The cause now came on to be heard upon the admissions of both parties. On behalf of the plaintiffs a letter was read which had been written to them by the defendant *Heyland*, in which he stated that *Hitchcock*, by indorsing the bill in his name, had committed a forgery.

Mr. *Hayter* and Mr. *L. Wigram*, for the plaintiffs.—The defendant *La Nauze*, by his original answer, admitted that he procured a second indorsement to be made of *Heyland's* name, and, consequently, that the former indorsement

was invalid. Upon that answer, it was considered by Lord *Lyndhurst*, that no property had passed in the bill before it arrived at maturity, and that afterwards no property in it could pass; and therefore he continued the injunction. The bill was afterwards amended, and by his further answer, the defendant, *La Nause*, attempted to set up a different case. He said that his former answer proceeded on a mistake; that *Hitchcock* indorsed the bill as the attorney of *Heyland*, and that the second indorsement was a mere nullity. The truth is, however, that the whole of the facts on which the Court is to proceed, exist as they did at the time of the injunction. *La Nause* had no legal title to the bill at the time it arrived at maturity. The letter of *Heyland* shews that the first indorsement of his name was a forgery. Now, however, that there is an arrangement between *La Nause* and *Heyland*, they are silent as to the forgery, and resort to the power of attorney, in order to shew that *Hitchcock* was authorized to sign bills in *Heyland's* name. The setting up the power of attorney was only an after-thought. At all events, there is nothing in the instrument itself which authorizes the agent to sign bills of exchange. [*Alderson, B.—Murray v. The East India Company* (a) went much farther than the present case. Here there is no power whatever to indorse bills. I think the case stands as it did before Lord *Lyndhurst*.] Then the Court will direct the bill to be delivered up: *Lisle v. Liddle* (b), *Mayor of Colchester v. Lowten* (c), *Peake v. Highfield* (d).

Mr. *Simpkinson* and Mr. *G. Richards* for the defendant *La Nause*.—The power of attorney is expressed in the most general terms with reference to the affairs of *Heyland*. There are two sets of general words, the first

1835.
 ESDAILE
 v.
 LA NAUZE.

(a) 5 B. & A. 204.
 (b) 3 Anstr. 649.

(c) 1 Ves. & B. 226.
 (d) 1 Russ. 559.

1835.
 ———
 ESDAILE
 v.
 LA NAUZE.

applicable to rents and debts on account of rent, and the second applicable to all circumstances whatever. It seems clear that *Hitchcock*, under this instrument, had power to indorse in the name of *Heyland*, and not merely by procuration. But, at all events, there is no case in which a Court of equity will enforce the delivery up of an instrument, where the party who holds it, whether it be void or not, is a purchaser for a valuable consideration without notice. It will leave the parties to settle the matter at law. *Mitford, Pl.* (3rd ed.) 222. *Hoare v. Parker* (a), *Bechinall v. Arnold* (b), *Jerrard v. Saunders* (c), *Wallwyn v. Lee* (d). The principle is applicable here. A defendant is not bound to resort to a plea, in order to insist on a purchase for a valuable consideration. He may do this by his answer, as was the case in *Jerrard v. Saunders*. It would be different if he attempted to recover in a Court of equity as a plaintiff; but equity will not interfere against him. Here the defendant was a purchaser for a valuable consideration without notice of the fraud, and the second indorsement cannot affect his title in that character. The acceptors in this case must be liable to the loss. They accepted the bill on the credit of *Gregg & Co.* Their acceptance implies that they had effects of *Gregg & Co.* in their hands sufficient to answer the amount, and they cannot now say that they had no such effects. At all events, the equity of the defendant is equal to that of the plaintiffs.

Mr. *Hayter*, in reply.

June 15th.

ALDERSON, B.—The facts of the case, as stated by the mutual admissions of both parties, are these. On the 9th March, 1832, *Robert Hitchcock*, jun., who was the agent

(a) 1 Cox, 224.

(b) 1 Vern. 354.

(c) 2 Ves. J. 454.

(d) 9 Ves. 24.

of the defendant *Heyland*, under a power of attorney, the terms of which I shall presently advert to, wrote to *St. George Gregg & Co.*, the drawers of the bill of exchange now in dispute, the following letter. [His Lordship then read the letter.] In pursuance of this letter, the bill now in question was drawn by *St. George Gregg & Co.*, on the plaintiffs, bankers in *England*, and given to *Hitchcock*. As soon as he got possession of it, he put upon it the indorsement of the name of *Heyland*, in favour of whom it was drawn, who was then absent from *Ireland*, and caused it to be put in circulation through a person of the name of *Stewart*, before it could be possible for *Gregg & Co.* to be aware of the dishonour of the *Coleraine* cheque, or to take any measure to prevent the acceptance of the bill by the now plaintiffs in equity. The defendant *La Nause*, on the 12th, became the purchaser of this bill, without any knowledge of the fraud, or suspicion of the genuineness of the indorsement, and paid full value for it. As soon as the bill had been thus put into circulation, it was transmitted for acceptance, and duly accepted by the plaintiffs. On sending, however, the cheque mentioned in the letter of the 9th *March* to *Coleraine*, it was dishonoured; and as to this part of the case, I entirely adopt the view taken of it by Lord *Lyndhurst*. It seems to me to have been a fraudulent contrivance by which *Hitchcock* obtained for his own use the amount of the bill in question. Subsequently to the bill becoming due, the defendant *La Nause*, who had then discovered the fraud and contrivance which had been practised, and who was apprized of the doubt as to the validity of the original indorsement, procured another and a real indorsement from *Heyland*, on the terms of equal division of the amount to be obtained from Messrs. *Esdaile & Co.* *La Nause* having afterwards brought an action at law, this bill has been filed.

The first objection to it is, that there is no ground for interference in equity, because *La Nause* is a *bonâ fide*

1835.

ESDAILE
v.
LA NAUZE.

1835.

ESDAILE
v.
LA NAUZE.

holder for value. If this were so, the authorities cited in the argument would lead me to think that the bill ought to be dismissed. But there is a fallacy in so considering him. It is not disputed that the plaintiffs would be entitled to redress in equity as against *Hitchcock*, the person by whom the fraud was accomplished, or *Heyland*, who is the same as *Hitchcock* for this purpose, being the principal on whose behalf *Hitchcock* appeared to act. And though a defence at law might be made under these circumstances, still fraud is equally cognizable in equity and the subject of relief. But here, although *La Nauze* is in the possession of the bill, having paid value for it, yet if the indorsement under which he received it is a forgery, it is the same as if there were no indorsement at all; and then he is not, in truth, the holder of it, for he has no title by indorsement, the only way by which he could obtain a title to this bill.

So it stands as to the indorsement originally written on the bill, unless, indeed, *Hitchcock*, who wrote it, had authority under the letter of attorney to indorse bills for *Heyland*. But looking at that instrument, I am clearly of opinion that it confers no such power. The general words are not sufficient, for they must be construed with reference to the antecedent matter, which states the purpose for which the letter of attorney was given. Perhaps they would be sufficient to confer all powers not specifically enumerated, but necessary to carry the principal purpose of the letter of attorney into effect.

But a power to indorse bills is not necessary, and being in truth an almost unlimited authority to pledge the credit of *Heyland*, it would be very dangerous to infer it, unless the power were very clearly to be inferred, or expressly given. Neither of these circumstances occur here. Whether the letter of attorney, and the generality of its phraseology, be sufficient to excuse *Hitchcock*, if criminally indicted, on the ground that he may *bond fide* have be-

lieved he had such a power, I do not presume to decide. That would be a question for the jury. I think, therefore, that in fact this first indorsement was in truth no indorsement, and consequently that it does not confer on *La Nause* the privilege of a *bond fide* transferree of the bill for value. Nor does the subsequent indorsement alter the case. That was made after the bill was over-due, and the plaintiffs, as against *La Nause*, claiming under that indorsement, would have all the equities they could have as against *Heyland*.

Upon the whole, I think the plaintiffs entitled to the relief they claim. But as I am satisfied that *La Nause* is equally with them a victim of the fraud of *Hitchcock*, I think the decree for the plaintiffs should not be accompanied with any decree against him for costs. Let the plaintiffs, therefore, have a decree in the terms they pray for, but let each party pay their own costs.

Decree accordingly.

See *Mead v. Young*, 4 T. R. 28.

HIPWELL and Another v. KNIGHT.

May 16, 18.
July 13th.

WILLIAM POOL, of *Steventon*, in the county of *Bedford*, baker and farmer, being indebted to the plain-

Time will, in equity, be deemed of the essence of the

contract, in all cases where it can be collected from the terms of the contract, that the parties intended that the time for its completion should be strictly adhered to. But, where, upon an agreement for the purchase of an estate, the parties entered into a stipulation that an abstract of title should be delivered immediately, and that, in case the contract was not completed by a given day, the purchaser should be released from his contract, and the abstract was not immediately delivered, but communications on the subject of the title were continued between the parties until the time limited by the contract had expired:—*Held*, that, under these circumstances, the benefit of the stipulation as to time was waived by the purchaser.

Where a person had contracted for the purchase of an estate from trustees under a deed of release and assignment for the benefit of the creditors of a trader, upon a stipulation that a good title should be made by a given day, and that day fell within the period during which a fiat in bankruptcy might have issued against the trader:—*Held*, that he was in the situation of a purchaser who had waived a stipulation that time should be of the essence of the contract.

Where parties contract that the purchase of lands shall be completed within so many months, *calendar* and not *lunar* months are intended.

1835.

HIPWELL
v.
KNIGHT.

tiffs and other persons, by indentures of lease and release and assignment, dated respectively the 7th and 8th days of *September*, 1832, but which were not gazetted pursuant to the provisions of the stat. 6 *Geo.* 4, c. 16, s. 4, conveyed all his real and personal property to the plaintiffs, upon trust to sell the same absolutely, and to apply the proceeds for the equal benefit of his creditors.

In pursuance of these trusts, the plaintiffs caused certain freehold and copyhold premises belonging to *Pool* to be put up to auction on the 31st of *October*, 1832, in fifteen lots, subject to certain conditions of sale. By the third of these conditions, each purchaser was immediately to pay a deposit of 20*l.* *per cent.* on his purchase-money into the hands of Mr. *Eagles*, the vendor's solicitor, and to sign an agreement for paying the remainder on the 6th of *January* following, when the purchase was to be completed; and if the completion of the purchase were delayed by any cause whatever beyond the 6th of *January*, the vendors were to be entitled to interest after the rate of 5*l.* *per cent.* for the remainder of the purchase-money.

The sale took place, and the defendant, by his agent *Thomas Knight*, was declared the purchaser of lots 1, 2, 8, and 15, for the sum of 3085*l.* *Thomas Knight* thereupon signed an agreement for the payment of 617*l.*, as a deposit, upon a given day, and of the remainder of the purchase-money on the 6th of *January* following. The defendant soon afterwards took possession of the three first-mentioned lots, and demised them to *Thomas Knight*, who planted an orchard upon them, and exercised various other acts of ownership.

On the 6th of *January*, 1833, the day appointed for the completion of the purchase, no abstract of the title had been delivered to the defendant. A correspondence then took place between the solicitors of both parties, in the course of which, and particularly by letters dated the 7th and 19th of *March*, the solicitors for the defendant

threatened to abandon the contract, and insisted that, at all events, as the purchase was not completed on the 6th of *January*, their client ought not to pay the interest which had been stipulated to be paid from that day. In consequence of this correspondence, an interview between the solicitors of both parties took place on the 23rd of *March*, on which occasion a fresh agreement was drawn up and signed by them, in the following terms:—

“Memorandum of an agreement, made and entered into the 23rd of *March*, 1833, between, &c. Whereas, *John Knight*, of *Harrold*, gentleman, by his agent, *Thomas Knight*, lately purchased by public auction lots 1, 2, 8, and 15 of certain estates at *Steventon*, belonging to the assignees of Mr. *William Pool*, the purchase of which was to have been completed, under the conditions of sale, on the 6th day of *January* last, and the said *John Knight* paid the sum of 617*l.*, exclusive of the auction duty, on account of the purchase-money, amounting to 3085*l.*; and whereas the said *John Knight* entered into possession of the said purchased premises, but hath not yet completed his purchase, no abstract of title having been yet delivered to him or to his solicitor; and whereas the said *John Knight* is now ready to complete his purchase, it is agreed as follows:—That an abstract of title shall be immediately delivered, and a good title made according and subject to the conditions within four months from the date hereof. That at that period, or sooner, if the title is completed, the purchase-money shall be paid. That with respect to a sum of 2000*l.*, part of the said purchase-money, no interest whatever shall be paid thereon from this time; and as to the remainder of the said purchase-money, 4*l.* 10*s.* *per cent.* only shall be allowed from this time. That if the title shall not be perfected within the time aforesaid, the said *John Knight* shall be released from his contract; and instead of the said *John Knight* receiving from his brother *Thomas Knight*, or whosoever may be in the occu-

1835.

HIPWELL

v.

KNIGHT.

1835.

HIPWELL
v.
KNIGHT.

pation of the said premises, the rents and profits thereof; the vendors shall receive them; the said *John Knight* hereby guaranteeing that the rents shall be paid from the time of possession being taken, until *Michaelmas* next. That if the title shall not be completed as aforesaid, the deposit money and auction duty shall be returned to the said *John Knight*, with interest, as is usually allowed in such cases. That the said *John Knight* shall, if requested, join the vendors in giving a notice to the said *Thomas Knight* to quit the premises at the expiration of his current year tenancy, or holding thereof; it being understood that the said *John Knight* shall not be under any obligation to compel the said *Thomas Knight* to quit the premises, although he will concur in any act which may be thought necessary for that purpose at the request of the vendors, and at their expense. That the said *John Knight* will, at the request of the vendors, or their solicitor, invest the said sum of 2000*l.*, either in Exchequer bills or on such other government securities as may be thought advisable, the vendors indemnifying the said *John Knight* from any loss in case the title should not be perfected, and allowing him 4*l. per cent.* on the money."

On the 30th of *March*, an abstract of title to part of the premises was furnished to the defendant's solicitor, and on the 13th of *April*, at their request, an abstract of title of the remaining part was sent to them. On the 18th these were returned with several observations and requisitions on the part of the defendant's solicitors, who considered the title very imperfect. From that day till the 21st of *July* communications took place between both parties relative to the title; the solicitors for the defendant complaining that the abstract, and further abstracts, sent, were not satisfactory. There were expressions contained in the letters of both parties, shewing that they considered that the time for completing the contract was drawing to an end. On the 21st of *July* the last ab-

abstracts were sent, and on the 23rd of *July*, being the day fixed for the completion of the contract, the defendant's solicitors returned the abstracts, with some further observations and requisitions. On the same day, however, formal notice was given in writing to the plaintiffs, and their solicitor, that the contract was abandoned by the defendant. On the 25th of *July* the solicitors for the defendant wrote to the plaintiff's solicitor as follows:—"We cannot but express our surprise that our first requisitions should have met with such little attention, and that after we had repeated them, we should, at the eleventh hour, indeed only the day before the expiration of the four months, have a further additional abstract of thirty-seven sheets. We have, as far as time would allow, observed upon the answers of the vendor's solicitor. We do not intend to confine ourselves to those objections only which we have already made upon the title, but reserve the right of making any other which may present themselves, if circumstances should render it necessary."

The plaintiffs filed their bill for a specific performance of the foregoing agreements, so far as related to lots 1, 2, and 8; offering to rescind the contract as to lot 15, as to which they admitted that a good title could not be made. They charged that they could make a good and marketable title to the three first-mentioned lots. That time never was of the essence of the contract, and that no damage or injury had been sustained by the defendant, by the non-completion thereof at the precise time specified; and moreover, that a good and marketable title was made out by the plaintiffs to the said three lots within the time stipulated by the second agreement. That any objection to the title which might be raised on the ground that the release and assignment of the 8th of *September*, 1832, had not been gazetted, had been waived by the defendant.

The cause now came on for hearing.

On behalf of the plaintiffs, the evidence of their solicitor

1835.

HIPWELL
v.
KNIGHT.

1835.

HIPWELL
v.
KNIGHT.

Mr. *Eagles* was read.—With reference to the charge in the bill, that time was not of the essence of the contract, this witness stated that when the abstracts were sent by him on the 21st of *July*, as before mentioned, to the defendant's solicitor, they were accompanied with observations, and a marginal note in the deponent's handwriting; that no notice was taken of these by the defendant's solicitor, but that further requisitions as to the title were made and demanded of the deponent at the time of the return of the abstracts, which he stated to be on the 26th of *July*, and consequently the deponent did not consider that the abstracts were returned to him as upon the termination of the contracts.

With reference to the alleged waiver by the defendant of the defect in the title, arising from not gazetting the release and assignment, the same witness stated that at the meeting at which the second agreement was drawn up, Mr. *Burnham*, the defendant's solicitor, inquired whether the assignment had been gazetted, to which the deponent replied that it had not, but that the defect might be supplied by an affidavit by Mr. *Pool*, that all his creditors who could by possibility make him a bankrupt had executed the assignment. That Mr. *Burnham* replied, that it would have been better had the assignment been gazetted, as it would have avoided any question. That the deponent explained that the omission had arisen from the hurry of business occasioned by the elections, which took place at that time. That upon this explanation, Mr. *Burnham* proceeded to draw up the agreement, mentioning three months for the completion of the purchase, which was afterwards altered to four months.

On the part of the defendant, the evidence of Mr. *Burnham*, one of his solicitors, was read.—Upon the question of time, this witness stated that at the interview between him and Mr. *Eagles*, the deponent asked *Eagles*

how long it would take to make out the title and complete the contract, with a view to having the time limited in the contract. That *Eagles* answered that the title was perfectly good, and that three months was sufficient. That the deponent thereupon prepared the contract accordingly; but that before or during the preparation thereof, he gave *Eagles* to understand that if the purchase was not completed within the time to be limited by the agreement, the defendant should be considered at liberty to abandon the agreement. That the deponent afterwards told *Eagles* that if he had any doubt about three months not being long enough, he had better take another month. That *Eagles* acceded to the deponent's offer, and altered the contract accordingly, by striking out the word "three," and substituting the word "four."

With respect to the assignment, this witness denied that he, or, as he believed, any other person at the time of drawing up the agreement of the 23rd of *March*, 1832, undertook or promised to accept any affidavit by *Pool*, or any other person, as a waiver or abandonment of any objection to the title to the premises founded upon the circumstance of the indentures of the 7th and 8th of *September*, 1832, being an act of bankruptcy on the part of *Pool*.

Mr. *Jervis*, Mr. *Simpkinson*, and Mr. *Hayter*, for the plaintiffs.—First, time was not of the essence of the contract. Even if it were of the essence of the first contract, it was not so of the second. The principal object of the agreement was to release the defendant from payment of interest. That is clearly shewn by the letter of the 19th of *March*, in which the solicitors for the defendant say—"You will recollect that by the conditions, our client is to pay 5*l. per cent.* interest from the 6th of *January*, when the purchase was to have been completed; under these circumstances, we will not allow him at any rate to pay

1835.

HIPWELL
v.
KNIGHT.

1835.
 HIPWELL
 v.
 KNIGHT.

this, and it will depend upon what passes at our interview whether we put into execution our threat or not." Then in consequence of this desire on the part of the defendants, the second agreement was drawn up, and by that it was stipulated that in respect of 2000*l.*, part of the purchase-money, no interest whatever should be paid. That was the primary object of the agreement, and the term of four months was inserted merely that some time might be named.

Secondly, the objection that time was the essence of the contract, has been waived by the conduct of the defendant. The time limited by the agreement was four months, and there being nothing from which the Court can infer that the parties meant the contrary, the time must be calculated according to lunar and not calendar months: *Co. Litt.* 135 b; *Catesby's case* (a); *Wollaston Dixie's case* (b); *Barksdale v. Morgan* (c); *Jocelyn v. Hawkins* (d); *Tullett v. Linfield* (e); *Lacon v. Hooper* (f); *Lang v. Gale* (g). According to that mode of calculation, the time mentioned in the contract did not expire on the 23rd, but on the 13th of *July*; and, therefore, any thing done by the defendant after that period, amounted to a waiver of the objection as to time. Calculating, however, by calendar months, the abstracts were not returned till the 23rd of *July*, and even then the defendant's solicitors do not insist on the expiration of the time, but make additional observations on the abstracts, and express an intention "to reserve to themselves the right of making any other objections, should circumstances render it necessary." Can it be said after this letter, that the stipulation as to time was not waived by the defendant? The cases upon

(a) 6 Rep. 61.
 (b) 1 Leon, 96; Vin. Abr.
 Time (C).
 (c) 4 Mod. 185

(d) 1 Strange, 446.
 (e) 3 Burr. 1455.
 (f) 6 T. R. 224.
 (g) 1 M. & S. 111.

this subject are collected in Sir *Edward Sugden's Treatise* (a), and amongst them that of *Seton v. Slade* (b) may be mentioned as being a much stronger case than this. Upon the whole, a Court of equity is extremely reluctant to hold time to be of the essence of the contract; and it should seem that a strict construction of contracts, with reference to time, can only be supported in equity in cases of a special nature, as where the lease of a house, or an annuity, is the subject of contract: *Withy v. Cottle* (c); *Levy v. Lindo* (d); *Doloret v. Rothschild* (e).

Thirdly, a good title was shewn within the limited time, and though under the Bankrupt Act the execution of the indentures of *September, 1832*, ought to have been gazetted, yet that objection was waived by the defendant's solicitor consenting to receive the affidavit of *Pool*; and now the lapse of time has conferred a good title, notwithstanding the statute.

As regards lot 15, the plaintiffs are willing that the defendant should be released from his contract; but inasmuch as the possession of that lot is not essential to the enjoyment of the others, the circumstance that a good title cannot be made to it, does not enable the defendant to put an end to the contract as to the other lots: *Poole v. Shergold* (f).

Mr. *Boteler*, Mr. *Temple*, and Mr. *Daniel*, for the defendant.—Time may in equity be made of the essence of the contract in three ways; namely, by considerations arising either from the nature of the property, or the laches of the parties, or express agreement. It was denied by Lord *Thurlow*, that any express stipulation that the purchaser should not be bound after a certain time,

1835.

HIPWELL
v.
KNIGHT.

(a) V. & P. 8th edit., pp. 365,
366.

(b) 7 Ves. 265.

(c) Turn. & Russ. 78.

(d) 3 Mer. 81.

(e) 1 Sim. & Stu. 596.

(f) 2 Bro. C. C. 118.

1835.

HIPWELL
v.
KNIGHT.

could be acted upon in a Court of equity. But that doctrine was impeached by Lord *Loughborough*, in *Lloyd v. Collett* (a), and afterwards overruled by Lord *Eldon*, as his Lordship notices on several occasions: *Levy v. Lindo* (b); *Boehm v. Wood* (c); *Withy v. Cottle* (d). And it is now well settled that the purchaser may expressly stipulate that beyond a certain time he shall not be bound. In *Hudson v. Bartram* (e) time was expressly made of the essence of the contract, and the Court would have decided accordingly, had not the defendant waived that part of the agreement. In *Lloyd v. Ripplingale* (f), the plaintiff had contracted to sell a manor in *Norfolk* to the defendant. It was stipulated in express words, that time should be of the essence of the contract. The abstract was delivered immediately, and was retained by the purchaser till within two days of the expiration of the time for completing the contract, when it was returned with 80 or 90 objections. The parties then came to an arrangement that the time should be extended, which was accordingly done by a second agreement, containing the same expression as to time as the former. A clause was likewise introduced, that such extension of time should not do away with the right to object that the title was not good. In the end, the purchaser turned round and would not take it, because the title was not made out at the time stipulated for. A bill was then filed for the specific performance of the contract, and it was contended on the part of the plaintiff, that the purchaser had made an unfair use of the stipulation as to time; but the Vice Chancellor held that time was of the essence of the contract, and that the stipulation was not waived by the defendant. [*Alderson*, B.—In that case the stipulation was express,

(a) 4 Bro. C. C. 469.

(b) 3 Mer. 81.

(c) 1 J. & W. 419.

(d) Turn. & Russ. 78.

(e) 3 Madd. 440.

(f) Not reported.

1835.

HIPWELL
v.
KNIGHT.

and the words “essence of the contract” were used. Is there any case where time is impliedly made of the essence of the contract? In *Seton v. Slade*, Lord *Eldon* seems to question whether the specific intention of the parties is not controlled by what the equitable construction of their intention ought to be. The cases turn not so much on the general intention of the parties as to time, but on whether they intended, in the technical sense, that time should be of the essence of the contract. If you and I agree to do a certain thing on a given day, that is clearly our intention, but is that of the essence of the contract in a Court of equity? It is apprehended that it is so now in equity; and if it be agreed that on a given day a person shall be released from his contract, that is now sufficient in equity to make time of the essence of that contract. Since the case of *Seton v. Slade*, that mode of construction has been adopted by several Judges, though it did not happen to require adoption by Lord *Eldon*. *Hudson v. Bartram* is in this respect an instance in point; but *Williams v. Edwards* (a) completely meets the present case. There one of the terms of the agreement was, that the contract should be void, if the purchaser’s counsel should be of opinion that a marketable title could not be made by a given time, and that was held to be a stipulation which made time of the essence of the contract. In addition to which, it may be remarked, that the inference which Sir *Edward Sugden* draws from the authorities is, that the real intention of the parties is to be regarded in all cases (b). Here the defendant found great inconvenience, arising from the delay under the first contract. Time was not of the essence of that contract, for it contained a stipulation providing for the event of the title not being completed by the 6th of *January*. The defendant soon found that the completion of the purchase

(a) 2 Sim. 78.

(b) V. & P. 8th edit. 378, et seq.

1835.


HIPWELL
v.
KNIGHT.

was delayed. An urgent letter was written by his solicitors on the 7th of *March*; a more decisive one on the 19th; and in the second letter they mention the payment of interest as one of the inconvenient results attending the delay, and not as a means of effecting a compromise. This led to the second agreement, which removes all the difficulty out of the purchaser's way. By this last agreement, no additional advantage as regards interest was given to the defendant, and, therefore, the stipulation as to interest is immaterial. It is clear, therefore, that the second agreement was made with an express view to shorten the time, and the alteration of the time for completing the contract from three to four months is an additional argument in favour of that view of the question, because it shews that the time was matter of anxious consideration.

But then it is said that the stipulation as to time has been waived by the defendant; and in support of that argument, the plaintiffs contend that the time, reckoning by lunar months, ended on the 13th of *July*. Notwithstanding the authorities cited on the other side, which, however, are contradicted by *Titus v. Lady Preston* (a), the time in these cases is to be calculated according to the common acceptation of the word "months." It was so calculated in *Seton v. Slade*; and in the present case, it is clear that the parties put no other construction on the word "months" than that which it usually bears. The parties understood throughout their proceedings that the time would expire on the 23rd; and on that day the abstracts were returned, and notice given of the abandonment of the contract. It is attempted to be said, that the defendant agreed to waive the objection that the assignment had not been gazetted, and to accept *Pool's* affidavit, that he had no debts upon which a fiat could issue. But the plaintiffs do not and cannot prove that the de-

(a) 1 Str. 652.

fendant agreed to accept such an affidavit ; and even if he had so agreed, it would not have cured the defect in the title : *Lowes v. Lush* (a).

1835.

 HIPWELL
 v.
 KNIGHT.

Mr. *Jervis*, in reply.—No doubt time may be of the essence of the contract in equity as well as at law. The question is, whether it was the essence of this contract. In ascertaining this question, your Lordship will not look to the terms of the contract alone, for that will be doing nothing in a Court of equity, but to all the circumstances of the case. Here it is to be remembered that the defendant entered into possession of the premises, altered the boundaries, cut down trees, and let the property to his brother, who planted an orchard, and made other alterations. These circumstances must be taken into consideration in dealing with the second contract. Taking them in connexion with the contract itself, it is clear that time was not of the essence of it. If the contract had been, that notwithstanding the defendant had taken possession, cut down timber, and exercised various acts of ownership, yet if the plaintiffs did not produce a good title by a certain time the contract should be rescinded, and time should be made of the essence of the contract—then, no doubt, it would be subject to the same construction in equity as well as at law. But in this case, the contract itself does not warrant, nor is it attended with circumstances that warrant, so rigid a construction. *Lloyd v. Rippingale* is distinguishable from the present case. There upon the time being extended, the stipulation as to time was repeated in the second agreement in the same words as before. In *Lloyd v. Collett*, the defendant was not in possession.

ALDERSON, B.—It is clear that if the title depended

(a) 14 Ves. 547.

1835.

HIPWELL
v.
KNIGHT.

on being completed on the 23rd of *July*, no title to the property was or could be made out on that day. There is no evidence that the defendant agreed to take the affidavit of *Pool* that all his principal creditors had executed the assignment, and the case which has been cited decides that a party is not bound to take a title so situated. There is nothing to shew that Mr. *Burnham* agreed to accept that title; and it ought to be a strong case to shew that a party on the part of his client agreed to waive a clear objection to the title. The question whether time was of the essence of this contract, appears to me a nice and difficult question to decide; and I am the more disposed to think so, when I find that in *Seton v. Slade*, Lord *Eldon*, with his profound legal attainments, says, that if he were required to express himself with great accuracy upon the principle involved in a variety of cases on this subject, it would be necessary for him to look into those cases. If, therefore, I shall be called upon to lay down any general rule of equity upon this question, *à multo fortiori*, must I take time to peruse and consider the authorities.

July 13th.

ALDERSON, B.—This was a bill filed by the plaintiffs, who are assignees of *William Pool*, a bankrupt, for the specific performance of a contract of purchase entered into by him with them. The original contract was dated 31st *October*, 1832, the defendant having purchased at the auction of the bankrupt's lands, three lots, viz. Nos. 1, 2, & 8, the property of the bankrupt, and No. 15, being the property of the bankrupt's brother, *Thomas Pool*, and included in the same auction.

We may begin by laying all question as to No. 15 aside, by the mutual admissions of both parties. As to the other three lots, one of the stipulations at the auction was, that a good title should be made on the 6th day of *January* following. Under this agreement the defendant entered

into possession, and let the lands to his brother, *Thomas Knight*, at a yearly rent, cut down some trees, and exercised various acts of ownership upon the property.

1835.

HIPWELL
v.
KNIGHT.

It is not disputed that time was not of the essence of this contract, and that, independently of the defendant's acts before enumerated, the omission to make out a good title on or before the 6th day of *January*, 1833, would have been no defence to the present suit, although at law it would have been a breach of the contract between the parties. But the present suit is resisted on grounds subsequently arising. From the correspondence between the solicitors, it appears that Messrs. *Burnham & Co.*, acting for the defendants, had pressed Mr. *Eagles*, who acted for the plaintiffs, for the delivery of the abstract of their title; and by a letter dated the 19th day of *March*, repeated the threat originally made by a letter dated *March* the 7th, that unless prompt measures were taken for completing the title, the defendant would throw up his purchase. Under these circumstances the parties met, and entered into the agreement dated the 23rd of *March*, 1833, upon which, in truth, the whole question now turns.

Now, the first question is, whether time is of the essence of this agreement. After examining with as much attention as I can the various cases brought before me during the argument, it seems to me to be the result of them all that a Court of equity is to be governed by this principle—it is to examine the contract, not merely as a Court of law does, to ascertain what the parties have in terms expressed to be the contract, but what is in truth the real intention of the parties, and to carry that into effect. But, in so doing, I should think it prudent, in the first place, to look carefully at what the parties have expressed, because, in general, they must be taken to express what they intend; and the burden ought, in good reason, to be thrown on those who assert the contrary.

1835.
HIPWELL
v.
KNIGHT.

In the case of a mortgage, however, which I use rather for the purpose of illustrating the principle than as at all parallel to the present case, the Court looking at the real contract, which is a pledge of the estate for a debt, treats the time mentioned in the mortgage deed as only a formal part of it, and decrees accordingly, taking it to be clear, that the general intention should override the words of the particular stipulation. So, in the ordinary case of the purchase of an estate, and the fixing a particular day for the completion of the title, the Court seems to have considered that the general object being only the sale of the estate for a given sum, the particular day named is merely formal, and the stipulation means in truth that the purchase shall be completed within a reasonable time, regard being had to all the circumstances of the case and the nature of the title to be made. But this is but a corollary from the general proposition, which is, that the real contract, and all the stipulations really intended to be complied with literally, shall be carried into effect.

We must take care, however, that we do not mistake the corollary for the original proposition. If, therefore, the thing sold be of greater or less value according to the effluxion of time, it is manifest that time is of the essence of the contract, and a stipulation as to time must then be literally complied with in equity as well as in law. The cases of the sale of stock, and of a reversion, are instances of this. So also, if it appear that the object of one party, known to the other, was, that the property should be conveyed on or before a given period, as the case of a house for residence or the like. I do not see, therefore, why, if the parties choose even arbitrarily, provided both of them intend so to do, to stipulate for a particular thing to be done at a particular time, such a stipulation is not to be carried literally into effect in a Court of equity. That is the real contract; the parties had a right to make it; why then should a Court of equity interfere to make a

new contract which the parties have not made? It seems to me, therefore, that the conclusion at which Sir *Edward Sugden*, in his valuable treatise on this subject, has arrived, is founded in law and good sense.

1835.
HIPWELL
v.
KNIGHT.

The only question, then, is to apply the test to the present case. Here the agreement of the 23rd of *March* arose out of a complaint of delay in completing the title. The agreement provided first that an abstract should be immediately delivered, and adds that a good title shall be made within four months from the date thereof. Then follows a stipulation for the payment of the residue of the purchase-money at the time the title is completed; and another stipulation relieving the defendant from the payment of interest in the mean time upon 2000%, which was in fact the greater part of the money remaining unpaid. If it had stopped here, the case would have been quite clear. I should have considered the time only formal, and the real contract, the relieving the defendant from payment of this interest during the reasonable delay necessary to complete the title. But the next stipulations are very important. They provide, first, that if the title be not completed within the fixed time, the defendant shall be released from this contract, and go on to stipulate as to the situation of the parties in that event, viz. that the vendors shall receive the whole rents of the premises from the tenant, for whose solvency, *up to Michaelmas following*, the defendant becomes guarantee, and that the deposit-money and auction duty shall be returned by the vendors to him with interest, and that, if required, he shall join them in giving a notice to quit to the tenant in possession.

I own that I cannot reconcile these stipulations with any other supposition than that both parties intended to fix a time for completing the contract, which was intended by them to be literally complied with. There is nothing inconsistent with this supposition in the admitted fact of

1835.

HIPWELL
v.
KNIGHT.

the change of the time from three months, as originally drawn, to four months, as it now stands. For the only question is, whether a fixed time was intended to be part of the agreement. Indeed I think this fact tends rather to confirm the supposition that time was intended to be of the essence of the contract: for, if not, it would have been almost immaterial whether the particular time named was three or four months, and probably no alteration would have been made. But if it were intended to be of the essence, then it would be material for the party who was to be bound by it to have the time for completing the contract as extensive as possible. I am, therefore, inclined to be of opinion, that time was of the essence of this agreement.

But it is not necessary to give a decisive judgment on this point, inasmuch as I think that if it were so, still the stipulation has been waived. The result of the cases on this subject seems undoubtedly to be, that slight circumstances are sufficient in a Court of equity to prevent a party from taking the benefit of such a stipulation; and that wherever a party has done any act inconsistent with the supposition that he continues to hold his opponent strictly to this part of his agreement, he is to be taken to have waived it altogether.

The circumstances in *Seton v. Slade*, in which Lord *Eldon* held the stipulation to have been clearly waived, were of this description: the defendant, who had intimated, at a very early period of the transaction, his intention of requiring the contract to be completed by a given day, had nevertheless received, without objection, the abstract, and retained it till the expiration of the term; and yet, though he sent it back at the expiration of the period, and forthwith did all in his power to put an end to the contract, Lord *Eldon* held that his receiving the abstract without objection at a time when it was clear that the title could not be completed within the specific period, was a waiver of that stipulation.

Here the defendant received the abstract at a time when, as it seems to me, it was impossible for the title to have been completed within the period limited. For according to the evidence, there was no possibility of making a good title, at all events, till the expiration of a twelvemonth from the execution of the assignment from *Pool* to the plaintiffs. The defendant's solicitor knew then that this assignment had not been gazetted, and according to his evidence, upon which I must act, there was no agreement for any affidavit of the assent of all material creditors as an equivalent for this omission. He ought, therefore, to have refused to accept the abstract, or to have sent it back forthwith. Instead of that, he keeps it to the last, and sends it back with observations, from which I should have concluded that the title was still open to further explanation, and more satisfactory proof. And even after this, on the 25th of *July*, the letter reserving a right to make further objections is written by the defendant's solicitors, and sent to the plaintiffs.

Upon the whole, therefore, I think that this case is like *Seton v. Slade*, and that the stipulation as to time has been waived by the conduct of the parties, and that I ought to decree that the plaintiffs are entitled to relief, in case they are able now to make a good title. I do not go on the ground that the time limited must be taken to be lunar months. It seems to me that that argument is not well founded.

It must be referred to the Master to examine and report whether the plaintiffs can now make a good title to the premises; and if they can, there must be a decree for a specific performance of the agreement. I think the Master must not, in that examination, allow any affidavit or proof of the assent of all creditors who could sue out a commission of bankruptcy, to be produced as a substitute for the non-gazetting of the deed of assignment by *Pool* to the plaintiffs. But if the mere lapse of time will be sufficient to cure that defect, that will be proper for him

1835.

HIPWELL
v.
KNIGHT.

1835.
 HIPWELL
 v.
 KNIGHT.

to take into consideration. At present I do not give any opinion on that point. The question of costs must of course be reserved.

May 30th.

Where a bond creditor, by agreement with his debtor, takes interest on his debt by anticipation, a Court of equity will restrain an action on the bond, whether brought against the principal or the surety.

Upon a motion to revive the common injunction, the Court will hear the defendant on the merits.

BLAKE v. WHITE.

THE late Sir *Francis Blake* being indebted to one *White* in the sum of 4300*l.*, executed to him a bond for securing the repayment thereof, with interest, on the 4th of *February*, 1814; and in that bond the present Sir *Francis Blake*, the eldest son of the obligor, and the plaintiff his brother, were sureties.

In *June*, 1818, Sir *Francis Blake* the father died, having by his will devised several considerable real estates to his eldest son, charged with the payment of his debts, and likewise appointed him executor. There were also certain real estates which descended to Sir *Francis Blake*, the son, as heir at law to his father.

In *October*, 1818, *White* agreed with the agent of Sir *Francis Blake* the son, that upon receiving the arrears of interest which were then due on the bond, and upon receiving the future payments half yearly on the 1st of *January* and the 1st of *July* in every year, he would give time to Sir *Francis Blake* as the heir at law of his father, for payment of the principal sum mentioned in the bond. Accordingly the arrears of interest were paid, and the following memorandum was endorsed upon the bond, and duly signed:—

“*October* 27th, 1818. The sum of 296*l.* 6*s.* 5*d.* is this day paid to me in full of interest on the within bond, due up to *January* 1st, 1819, and the subsequent payments to be made every six months, commencing the 1st day of *July*, 1819.

“(Witness) *J. Carmichael.* (Signed) *James White.*”

The interest was regularly paid to Mr. *White* at the times stated in the agreement. In 1830 it was, with his consent, reduced from 5*l.* to 4*l.* 10*s.* *per cent.* In 1832 *White* died. In 1833 his widow and executrix brought an action on the bond against the plaintiff, who thereupon filed his bill, stating that *White* had, upon the application of Sir *Francis Blake*, agreed to give him time for payment of the bond out of the real and personal assets of his father, and praying that it might be declared that the plaintiff, as surety in the bond, was released in equity from payment of the debt, and that the defendant might be restrained from proceeding in the action, or commencing any other action against him.

The plaintiff obtained the common injunction, which, however, was dissolved upon the coming in of the answer of the defendant, who denied, to the best of her belief, that any such application as that stated in the bill had ever been made to *White*, or that there was any understanding that the time for payment of the debt should be extended. Upon the dissolution of the injunction, the parties proceeded to the trial of the action at law, and a verdict was found against the plaintiff in equity. The plaintiff then amended his bill, by inserting in it a statement of the written agreement of *October*, 1818, and of the circumstances connected therewith; and the defendant having obtained leave for time to answer the amended bill, a motion was now made, founded on affidavits, to restrain the defendant from entering up judgment on the verdict, or from suing out execution in the action.

The plaintiff, by his affidavit, stated that he was no party or privy to the arrangement in *October*, 1818, between *White* and the agent of Sir *Francis Blake*, or to the agreement or memorandum indorsed on the bond; and that he did not know until early in the present month (which was since the action), that such an agreement or memorandum had been made. He added, that the pay-

1835.

BLAKE
v.
WHITE.

1835.

BLAKE

v.

WHITE.

ments of reduced interest had been made without his knowledge or privity.

Mr. *Cooper*, in support of the motion, cited *Lingham v. Toule* (a), and contended that upon shewing that he had infused new equity into the bill, supported by affidavits, he had a right, as of course, to have the injunction revived; and that the Court would not hear the other party at this stage of the proceedings. But the *Lord Chief Baron* intimating his dissent from the latter part of this proposition—

Cooper proceeded to argue the merits.—Till within the last few years, the species of relief sought by this bill could only be had in Courts of equity; and in *Davey v. Prendergrass* (b), Lord *Tenterden* expresses his opinion to be, that a discharge by parol ought not to be admitted as a defence in a Court of law, to an action brought on an instrument under seal. Other Judges have shewn a disposition to admit the defence which Lord *Tenterden* deprecates. That, however, does not oust the jurisdiction of Courts of equity; and here the plaintiff was ignorant of what the actual agreement was, until after the trial of the action. The surety under such circumstances has a clear title to relief in a Court of equity. [The *Lord Chief Baron*.—Do you contend that in equity a parol agreement, without consideration, not to sue, is sufficient to discharge the surety? Does a Court of equity execute an agreement without consideration?] In *Nisbet v. Smith* (c), the principal debtor in a bond having been arrested by the creditor, the latter agreed to waive further proceedings, upon the debtor giving a warrant of attorney to confess judgment. Upon that warrant of attorney was in-

(a) 1 Anstr. 188.

(c) 2 Bro. C. C. 579.

(b) 5 Barn. & Ald. 187.

1835.

BLAKE
v.
WHITE.

dorsed an agreement, that no execution should issue for three years; and Lord *Thurlow* discharged the surety, upon the ground that the transaction was unjust, as it gave a credit for three years longer than the bond imported, contrary to the inclination of the surety. [The *Lord Chief Baron*.—Is there any case where the surety has been discharged upon a mere parol promise to give time? In an action on a bond, the defendant cannot, even if there be a consideration, set up any contract made between the obligee and the principal, unless that contract be under seal. Equity, on the other hand, makes no such distinction, if there be a consideration. Is there here sufficient consideration?] Here the consideration for the forbearance of the obligee was, that he should receive interest upon the bond up to the 1st of *January*, 1819. That included interest which was not yet in arrear. Now a surety has always a right to come into equity and call upon the obligee to sue the obligor: *Rees v. Berrington* (a). But this arrangement put it out of the power of the obligee to sue with success.

Mr. *Koe*, for the defendant.—There was, in this case, no such contract for giving time to the principal as will discharge the surety in equity. Before the surety can avail himself of such a contract, it must be shewn to be such as can be enforced between the principal and the creditor at law. This is not an express contract relating to the principal money secured, but only an implied contract as to the interest, and could not have been enforced at law. The obligee might still have recovered in an action on the bond. [The *Lord Chief Baron*.—Because a Court of law has no discretion as to instruments under seal. But suppose there had been a parol contract to pay a sum of money at a given day with interest, and the

(a) 2 Ves. Jun. 540.

1835.

BLAKE
v.
WHITE.

money not being paid on that day, the parties had agreed that the debtor should pay an anticipated interest; if, after that, the creditor brought his action, would not the new agreement have been a good defence at law? How can a man demand principal for what he has already taken interest?] The receipt of interest by anticipation is not evidence of which a surety can avail himself, to shew that time was given. The relief given to the surety proceeds on the ground that he is damnified by the agreement between the creditor and the principal debtor. Here the surety was not in any way damnified by the agreement. [The *Lord Chief Baron*.—The question is, whether, if the obligee had brought an action on the 28th of *October* to recover the penalty of the bond, a Court of equity would not have entertained a bill to restrain that action upon the suggestion and proof that he had taken interest up to the 1st of *January*? Or, suppose the case of a simple bond, without any surety, and interest taken by anticipation, and then an action brought on the bond; would there be no remedy for the obligor in equity?] However that might be, it is submitted, that this is a mere implied contract, of which the surety cannot avail himself. The interest was considerably in arrear, and the agreement was not to sue till the 1st of *January*. That is not sufficient to support the case of the surety. There may be many dealings between creditor and the principal debtor, which would not discharge the surety: *Mayhew v. Crickitt* (a). In *Heath v. Key* (b), it was held, that a Court of equity will not relieve a surety in these cases, unless there has been an express and positive contract for giving time to the principal debtor.

THE LORD CHIEF BARON.—There appear to me to be strong grounds for granting this injunction. When the

(a) 2 Swanst. 185.

(b) 1 Y. & J. 434.

case comes to be finally heard, it may appear in a different point of view. Possibly at a subsequent stage of the proceedings, the plaintiff at law may make out that she is entitled to maintain her action; but the question is sufficiently doubtful for me to say, that she ought not now to be permitted to enforce her remedies at law. I do not proceed on the ground that the question as to consideration is immaterial, because I consider that an agreement without consideration is as unworthy of attention in a Court of equity as in a Court of law. But in equity all agreements for consideration are equally binding, whether under seal or not.

Supposing that the case made by this bill were a good defence to an action, it does not appear that the defendant at law had any knowledge of the agreement before the time when it would have been necessary for him to have put in his plea, and, therefore, that circumstance alone would be sufficient to suspend proceedings against him. But I am of opinion that it would not be a good defence to an action, because it is not permitted at law to give evidence of the alteration of an agreement under seal, by an agreement not under seal. If I could allow this to be a good defence at law, and it could be shewn that the defendant at law had time to become acquainted with the circumstances, it might be a reason for coming to a different conclusion; but that not being so, the question is, whether, under this state of facts, the plaintiff can sustain the injunction.

It appears, that in 1818 the bond became due, and also arrears of interest to the amount of upwards of 200*l.*, concerning which, it is clear that some agreement took place. Now, whether this was or was not an agreement merely to give the debtor time till the 1st of *January*, would be a question perfectly unimportant; because a mere agreement to give time without any consideration, would not prevent the creditor from successfully prosecuting his action at

1835.

BLAKE
v.
WHITE.

1835.

BLAKE
v.
WHITE.

law. But the question is, whether time was not given to the 1st of *January*, 1819, upon a valuable consideration? The fact is admitted that the obligee received interest up to that time in the month of *October* preceding. Could he then in the interim have been allowed by a Court of equity to bring his action on the bond? I think not. It is admitted that in the case of a principal only, without a surety, if the debtor had given six months interest in advance, a Court of equity would interfere to stop the action. If, in such a case, the time for payment of the interest could be explained consistently with the action, that would alter the state of the case; but, if it appeared simply that the six months' interest had been given, what could the imagination suggest, but a contract *ipsissimis verbis*, that the creditor should not sue for that time? Besides, the interest being paid, would a Court of equity endure that the creditor should put that interest into his pocket, and next day sue for the principal?

If that be so, as between the principal debtor and the obligee, the same principles will apply to the surety. The question here is, whether the party did not preclude himself from suing on the bond, by receiving by anticipation the interest due between *October* and *January*. The shortness of that period cannot affect the question. Taking even a hour's interest in the same manner, if it were the habit to reckon interest by hours, would be attended with the same consequences. Under the present circumstances, I must grant this injunction. Perhaps, at the hearing, the facts of the case will be more fully explained.

Injunction granted.

1835.

Lord CAWDOR v. LEWIS.

June 12th.

THE original bill stated, that the late Lord *Cawdor*, the father of the plaintiff, was lord of the manor of *Kidwelly*, in the county of *Carmarthen*, and also seised in fee of divers real estates in the parish of *Llanelly*, within the said lordship and elsewhere. That *Thomas Lewis*, deceased, was, from the year 1810 to the year 1816, the land agent, steward of the manor, and solicitor of Lord *Cawdor*; and was, during the whole of that period, his confidential adviser, and thereby became well acquainted with the nature, extent, and value of his estates. That there is within the said manor, a piece of uninclosed ground, called *Hook Bank*, containing about ten acres, and bounded on one side by *Penrhos Fawr* farm (which is separated from it by a ditch or fence), and on the other side by the sea. That *Hook Bank* was in the occupation of Lord *Cawdor* from 1810 till his death, and considered by him to be part of his own property. That Lord *Cawdor* being owner of certain lead mines in *Carmarthenshire*, and being desirous of erecting a smelting-house, consulted *Lewis* on the subject; and, accordingly, in the year 1812, by the advice and with the approbation of *Lewis*, he erected a smelting-house and other buildings on *Hook Bank*. That *Lewis* superintended the works, and paid the expenses, which were allowed to him in his accounts as agent. That Lord *Cawdor* died in the year 1821; and, thereupon, the plaintiff became entitled to the manor of *Kidwelly*. That *Lewis* never at any time, during the lifetime of the late Lord *Cawdor*, and never during the possession of the plaintiff, until the year 1828, claimed or pretended to claim, or gave the late Lord *Cawdor* or the plaintiff any reason to know or suspect, that he claimed any right or title to the land called *Hook Bank*; but that in 1828, he, for the first time, claimed to be absolutely en-

Where an agent had permitted his principal to expend money on an estate which the agent afterwards claimed as his own, and to which his real representative established a legal title by ejectment, the Court granted an injunction to restrain an action brought by the agent's representative for mesne profits.

Where an action of trespass for mesne profits is brought against a party who has a cross claim against the plaintiff at law for money expended on the land, the Court will grant an injunction to restrain the proceedings at law; there being no right of set-off in such an action.

1835.

CAWDOR
v.
LEWIS.

titled thereto as part of *Penrhos Fawr* farm, of which he was the owner. That *Lewis* died in the year 1829; and that thereupon his eldest son, the defendant, *David Lewis*, became entitled to *Penrhos Fawr* farm. That the defendant *Lewis*, together with the other defendants (who were trustees under certain terms for years in the *Penrhos Fawr* property), having brought their action of ejectment against the plaintiff for the recovery of *Hook Bank*, had lately obtained a verdict in that action.

The bill charged that *Thomas Lewis* designedly and fraudulently permitted the late Lord *Cawdor* to treat and deal with the land in question as his own, and to lay out large sums of money in buildings thereon, without informing him, as he was in equity bound to do, that he claimed the land as his own property. That the late Lord *Cawdor*, with the privity of *Lewis*, exercised various acts of ownership on the property, and, in particular, let one of the buildings in question at a weekly rent, though, by reason of the lessee's poverty, he received no rent; and that, in 1825, the whole of the smelting-house and buildings, with the privity of *Lewis*, were let by the plaintiff to *Hugh Waddle* for twenty-one years, at a rent of 20*l.* per annum.

The bill prayed that the plaintiff, as lord of the manor of *Kidwelly*, might be declared well entitled to the piece of land called *Hook Bank*, and might be reinstated therein, and quieted in the possession and enjoyment thereof; or that he might be declared to be entitled to compensation in respect of the sums of money expended by the late Lord *Cawdor*, in the erection of the smelting-house and buildings. That, if necessary, an account might be taken of those sums &c., and that the defendants might be restrained from proceeding in their action, or commencing any other action in respect of the premises.

The plaintiff having omitted to obtain any injunction in pursuance of the prayer of this bill, the defendants brought their action for mesne profits; upon which the plaintiff

filed his supplemental bill, praying that the defendants might be restrained from proceeding in that action.

The defendant *Lewis*, by his answer to the original supplemental bill, admitted that from the year 1810 to 1816, his father, *Thomas Lewis*, was land agent, steward of the manor, and solicitor of the late Lord *Cawdor*, and enjoyed the confidence of Lord *Cawdor*. He admitted that there was an uninclosed piece of land within the manor of *Kidwelly*, called *Hook Bank*, but denied Lord *Cawdor's* title to it, or that it was waste land of the manor; alleging, on the contrary, that it belonged to *Penrhos Fawr* farm, and that it was only divided from that farm in the same manner as one inclosure of that farm is divided from another. He stated that in 1811, before the smelting-house was built, all the common lands in *Kidwelly* had been inclosed by act of Parliament; that two allotments were awarded to Lord *Cawdor* as lord of the manor, in respect of open lands, and that one of these allotments abutted on *Hook Bank*. That Lord *Cawdor* was well aware that all the open lands had been inclosed, and signed the award himself, with the map attached thereto. That in 1812 Lord *Cawdor* applied to *Lewis* to have part of the *Hook Bank* for the purpose of a smelting-house, to which proposal *Lewis* consented. The defendant then stated his belief that Lord *Cawdor* erected the smelting-house with the knowledge and approbation of *Lewis*; but he denied, to the best of his belief, that *Lewis* advised the plan, or superintended the works; on the contrary, he alleged that one *Neville* superintended them. He denied, to the best of his belief, that *Lewis* was employed to pay the expenses of the works, further than that he, as the agent of the late Lord *Cawdor*, from time to time, supplied money to *Neville*, in order to the payment of such expenses, for which money he regularly accounted in his agency accounts. He believed that Lord *Cawdor* considered *Hook Bank* to be the property of *Lewis*, but that there was an understanding

1835.

CAWDOR
v.
LEWIS.

1835.
CAWDOR
v.
LEWIS.

between the parties, that Lord *Cawdor* was to have a lease of the smelting-house, though Lord *Cawdor* paid no rent for it in the mean time, by reason of the cross accounts between his Lordship and *Lewis*. He believed that the buildings were let, with the privity of *Lewis*, on the terms mentioned in the bill.

The defendant then stated, that in consequence of the plaintiff's solicitor having expressed his opinion that Lord *Cawdor* had a right to the land in question, with the smelting-house and buildings, either by adverse possession or length of time, and having proposed to refer the matter in dispute to arbitration, the defendant acceded to such proposal, without prejudice to his rights, to bring the expense of the execution of the buildings into account, in any arrangement that might be made between him and the plaintiff.

The defendant then submitted that the question as to the plaintiff's title to the premises as lord of the manor of *Kidwelly*, was a legal question, and had already been determined at law; and he claimed the benefit of a demurrer as to so much of the bill as sought relief upon that point. With respect to that part of the bill which sought for compensation, and for an account, he insisted that the present suit was wholly unnecessary, he having been always willing to make a reasonable compensation to the plaintiff for the buildings in question, if the plaintiff had confined his claim to such compensation, and had not set up a title in himself as lord of the manor of *Kidwelly*.

An injunction having been obtained pursuant to the prayer of the supplemental bill, and afterwards extended to stay trial—

Mr. *Wigram* and Mr. *Jemmett* now shewed cause against dissolving the injunction.—If a person, knowing that certain lands belong to himself, stands by and permits another to expend money upon them, without giving him notice of

his title, and afterwards asserts his claim, the Court will give relief to the party so aggrieved: *East India Company v. Vincent* (a); *Attorney-General v. Balliol College* (b). The only question is, in what way the relief is to be given; whether by compelling the owner of the property to grant a lease, or by giving the injured party a lien on the land. We rely on the latter mode as the more beneficial. [The Court then called upon the defendants' counsel.]

1835.

CAWDOR
v.
LEWIS.

Mr. Swanston, Mr. Wilbraham, and Mr. Pole, *contrà*.—The bill proceeds on two assumptions, which cannot exist together; first, that Lord Cawdor is entitled to the legal estate in the premises as lord of the manor of *Kidwelly*, a declaration to which effect is prayed by the bill; and secondly, that the legal estate is not in Lord Cawdor, but in *Lewis*; and that Lord Cawdor is entitled to an equitable compensation for the money laid out. The first part of the bill is demurrable. [The *Lord Chief Baron*.—It is conceded that the plaintiff can proceed upon the second part only.] But having all along rested on his supposed legal title, he cannot now for the first time be heard to say that he has not the legal title. The application to stay trial must have been founded on the ground that he had a legal title, and upon an affidavit that the discovery made by the defendant's answer would be material to his defence at law. Having obtained a discovery for the purpose of having his legal right tried, he cannot now alter his position. [The *Lord Chief Baron*.—The defendant, in an action for mesne profits, cannot set up the legal ownership.] At all events, having failed in the action of ejectment, and having thereby given the defendant the consequential right to mesne profits, he cannot now come to restrain the defendant from pursuing that

(a) 2 Atk. 83.

(b) 9 Mod. 411.

1835.

CAWDOR
v.
LEWIS.

right. The mesne profits may far exceed the compensation which he claims, and he does not submit by his bill to pay the difference which may be found against him.

The LORD CHIEF BARON.—This is a plain case, and I think that I should be doing great injustice if I were to allow the parties to go to trial. If the bill were confined to the claim made as to the legal title, it could not be entertained; but the prayer of it is in the alternative, and it cannot be said that because a part of the bill may be demurrable, the other part must be dismissed, and the plaintiff is to be deprived of all intermediate advantage. Lord *Cawdor* says that he is entitled to compensation, and that the other party is not entitled to bring his action for mesne profits, and accordingly he prays redress in equity, suitable to the nature of his case. It is remarkable that the defendants admit that Lord *Cawdor* has an equitable claim to some compensation; but they say that there is no occasion for the plaintiff to come into a Court of equity for relief because they are ready to submit the matter to arbitration. That, however, is not a sufficient answer to the claim made by the plaintiff, because he is entitled to come into this Court for relief. The admission of the defendants, in fact, puts them out of Court; for if there be such a claim on the part of the plaintiff, which may be referred to arbitration, *à fortiori*, it may be made the subject of compensation before a Master or a Judge: and how can I tell (the admission being made) that the plaintiffs at law are entitled to sue for mesne profits at all?

It appears that Lord *Cawdor* was owner of the manor of *Kidwelly*, and likewise owner of certain lead mines in the neighbourhood; there were also uninclosed lands in the same manor belonging to *Lewis*, upon which the buildings in question were erected. It seems that *Lewis* was the confidential agent of Lord *Cawdor*; and it is, to

1835.

CAWDOR
v.
LEWIS.

me, extraordinary that Lord *Cawdor*, relying upon his agency, should have erected buildings for working lead upon these lands, there being other lands adjacent of which he was himself seised in fee. What necessity was there for Mr. *Lewis*, during the time he was such agent, to allow Lord *Cawdor* to erect a smelting-house upon lands belonging to *Lewis*, which were only divided by an imaginary line from the lands of Lord *Cawdor*? It is said, that Lord *Cawdor* could not legally lay claim to the buildings erected on *Hook Bank*; because, in the award and the map, that piece of land is not described as being his property, and he must have known from that, and other circumstances, that it did not belong to him. That observation strikes me as being most extraordinary. True, Lord *Cawdor* might have known that *Hook Bank* was not his; but why am I to found any inference upon such a supposition, against the strong presumption that he believed the buildings were erected on his own property? It is extraordinary to say, that he intended to erect buildings for a permanent object on another person's lands.

It is admitted to be a proper subject for equitable interference, where one party stands by and allows another to spend money upon his lands without giving him notice of his title. *A fortiori*, a Court of equity relieves against an agent who expends his principal's money upon his own land. Whether the relief be a perpetual injunction, or an allowance by way of compensation, or a lease, must be determined by the result of the hearing. Under these circumstances, it would be perfectly idle to allow the action to be tried. In any case, whatever might be the mode of compensation here, a trial for mesne profits would be utterly useless; and if effect can be given to Lord *Cawdor's* claim only in a Court of equity, why should I allow the other party to go to law and put the money in his pocket? It is stated, that no rent was claimed by Mr.

1835.

CAWDOR
v.
LEWIS.

Lewis of Lord *Cawdor*; but, if there were any agreement that the rent should be set-off against any cross demand of Lord *Cawdor*, that will not alter the situation of the case, because, in an action for mesne profits, no set-off is allowed.

Injunction continued to the hearing.

June 16th.

BERRINGTON and Others v. EVANS.

Where a judgment creditor had allowed 20 years to elapse without taking steps to recover his debt, and then ascertained that during the 20 years a suit had been instituted for the benefit of the specialty creditors of his debtor, and that under a decree in the suit they had received part payment of their debts, and that there was money in Court available for the payment of the remainder:—

Held, that he was barred by the Statute of Limitations from proving his debt before the Master, and receiving payment rateably with the other creditors.

IN this case the bill was filed by the plaintiffs on behalf of themselves, and all other the specialty creditors of the late Sir *Watkin Lewes*, who died intestate, praying the usual relief. By the decree made on the hearing of the cause, on the 9th of *December*, 1821, it was referred to the Master to take an account of the specialty debts of the intestate, and also of his personal estate: and in case that was not sufficient for payment of those debts, then to take an account of his real estates, &c. And the Master was directed to publish advertisements in the *London Gazette*, and other newspapers, for the purpose of giving notice to such specialty creditors to come in before him, and prove their respective debts, by a day to be appointed for that purpose, and in default thereof, the said specialty creditors were to be excluded the benefit of the said decree.

The Master, by his report, dated the 21st of *June*, 1830, certified that he found that the intestate was at the time of his death indebted to sundry persons on judgments and other specialties. That the usual advertisements had been inserted in the *Gazette* and other newspapers, which he mentioned, by which the specialty creditors were required to come in before him, and prove their debts by a given day. That the appointed day had expired, and that no person had appeared to prove any such debt, except the persons named in the schedule to his

report. He therefore did not find that any specialty debts, except those mentioned, remained due to the intestate's estate.

By the decree made on further directions on the 16th of *February*, 1831, the Master's report was confirmed, and he was directed to tax all parties their costs, to be paid out of the money in Court, and to apportion the balance rateably amongst the specialty creditors. By a further report, dated the 7th of *April*, 1831, the Master certified that he had pursued these directions.

A petition in the cause, supported by affidavit, was now presented by *John Kemp*, who had not appeared before the Master, alleging that he was a creditor of Sir *Watkin Lewes*, under a judgment entered up by virtue of a warrant of attorney, dated the 2nd of *January*, 1813. That the debt in question had been also secured by the bond of the daughter of Sir *Watkin Lewes*, conditioned for payment of the money after her father's death. That she died in the lifetime of her father, whereby the bond became void. That the petitioner believing that Sir *Watkin Lewes* had only a life interest in his estates, considered that the debt had been wholly lost, until lately informed by his solicitor of the proceedings which had taken place in the cause. That the petitioner had not seen any of the advertisements which had been published by the Master, and was, until lately, entirely ignorant of his right.

The petition, after alleging that a considerable sum of money on account of the intestate's property had been paid into Court since the report of the 7th of *April*, 1831, prayed that the petitioner might be at liberty under the decree of the 9th of *December*, 1821, to go in and prove his debt before the Master, and might be paid his debt rateably with the other creditors, out of the interest and dividends of the money now in Court.

Mr. *Spurrier*, for the petition.—In a suit like the pre-

1835.

BERRINGTON
v.
EVANS.

1835.

BERRINGTON
v.
EVANS.

sent, the creditor may at any time after the Master has made his report, come in and prove his debt: *Angel v. Haddon* (a), *Greig v. Somerville* (b). It will be contended that, under the late statute (c), the petitioner is too late in his application; but that statute does not alter the rule of relation which has been adopted by Courts of equity in these cases. In *Sterndale v. Hankinson* (d), it was held, that where a bill is filed by a creditor on behalf of himself and all others, every creditor has an inchoate interest in the suit from the moment the bill is filed; and that, from that moment, time does not run against him. In that case, which was one of simple contract creditors, more than six years elapsed between the filing of the bill and the decree, and the whole argument turned on that circumstance; it being admitted that, if there had been a decree within the time, there would have been no difficulty. Notwithstanding that difficulty, however, the Vice Chancellor allowed the claim of the creditor. In the present case, the decree was made in 1821; therefore, not one-half of the twenty years within which the petitioner might make his claim had expired at that time. That being so, if

(a) 1 Madd. 529.

(b) 1 Russ. & M. 338.

(c) Stat. 3 & 4 Will. 4, .c. 27, sect. 40. By which it is enacted, "that after the 31st day of December, 1833, no action or suit or other proceeding shall be brought, to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the

meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto or his agent; and in such case no such action, or suit, or proceeding, shall be brought but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one was given."

(d) 1 Sim. 393.

he has a right to establish his claim by relation to the time of filing the bill, *à fortiori* he has the same right by relation to the time of the decree.

1835.
BERRINGTON
v.
EVANS.

Mr. *Simpkinson* and Mr. *Duckworth*, for the plaintiffs.—In *Sterndale v. Hankinson*, the creditors adopted the suit and claimed relief under it, and the judgment of the Vice Chancellor turned upon that circumstance; whereas, here the petitioner repudiates the suit, or at least his own laches prevented him from adopting it. Besides, when *Sterndale v. Hankinson* was decided, there was no statute which in terms applied to Courts of equity. Those Courts, therefore, thought that they might, when expedient, go out of the statute; though in most cases they adopted it. Now, however, the statute is equally binding on Courts of equity as Courts of law; and there is nothing which can prevent its operation but part payment or a written acknowledgment within the time.

Mr. *West*, for the heir at law.

Mr. *Spurrier*, in reply.—It cannot be imputed as laches to the petitioner, that he did not see the Master's advertisements. In *Angel v. Haddon*, the merits relied upon were, that the creditor was not aware of the decree. In recent cases, the funds have been called back after apportionment. With respect to the Statute of Limitations, no doubt it applies to equitable as well as legal proceedings; but it does not alter the question of relation. The Court will not deviate from settled rules, merely because the limitation of time, instead of being fixed by analogy, is fixed by express enactment. The petitioner has still a right to insist that his claim was made when the suit commenced.

The LORD CHIEF BARON.—It appears to me, that if

1835.

BERRINGTON

v.
EVANS.

the argument for the petitioner be adopted, it will lead to this consequence, that at any period after the present, the claim of any creditor might be put in operation, so long as any portion of the estate remains undivided. That brings me, then, to this question—whether, for the purpose of forcing a construction to take a particular case out of the statute, by holding that a suit, though unknown by a man to have existed, shall be deemed his suit—whether, notwithstanding, too, the old principles of Courts of equity relative to stale demands, a creditor, under these circumstances, shall be allowed to enforce his claim at any period of time, even, perhaps, when the cause is dismissed? The argument which has been urged is ingenious; but, if I were to allow it to go the length contended for, no Judge, under any circumstances, could resist a demand of this sort. It is urged, that a bill filed by one creditor on behalf of himself and all others, is a bill filed by all, and, consequently, that if it be filed before the Statute of Limitations has attached to the debt of any creditor, it is good to keep that creditor's claim alive, and, therefore, that any creditor who never has heard of the suit, may come at the end of fifty years and insist upon being let in. That is the extent of the argument, and that is made to depend only on the case of *Sterndale v. Hankinson*. If I were forced by any thing that appears in that case to carry it to the extent contended for, I should feel bound to yield to its authority. But upon looking at that case, I think that I should not be justified in pressing it to that length. There the intestate died in *June*, 1810, the bill was filed in 1812, and the decree was made in 1818, which was the first period when any other creditor than the plaintiff could take advantage of the suit. The decree being made, the creditor whose claim was disputed came before the Master, and in effect made this statement—"I was aware of the suit, but I considered the bill to be filed on my behalf. It was filed with my knowledge and my consent, and,

therefore, I took no steps. I could not in this suit have made my claim at any other time, and if I am barred of my relief, the consequence will be, that every creditor will be barred unless he files his bill or brings his action and puts the estate to the expense of a number of suits." Now, as the Statute of Limitations was a bar to claims at law, but not to claims in equity, (Courts of equity only acting in general by analogy to the proceedings at law), it often became the duty of the Judge in equity to consider whether the statute might be rendered applicable to equitable proceedings. The Judge in equity had a right to look to the facts of the case, to see whether the time limited by the statute having elapsed, the statute should be allowed to operate, or whether circumstances did not qualify its operation, so as to do away with the rule drawn from analogy. Now, in the case in question, the Judge considered that the facts qualified the rule.

If I were obliged to consider the effect of that decision as establishing a general rule, under all circumstances, that the filing a bill by one creditor of *A.* on behalf of himself and all others, lets in the claims of all the other creditors, it is clear that the new statute would have no application to this case, because this would then be the suit of *Kemp* as well as *Berrington*, and the bill having been filed within the twenty years, *Kemp's* interest could not be affected by the new statute. But I own I cannot conceive that the case goes the length of deciding that time could, under no circumstances, be a bar in such a suit, either on the statute analogy, or any other. That being so, let us see how the case is affected by the new statute.

At law, even before the statute, the petitioner could not have enforced his judgment after twenty years. The new statute fixes the time for bringing an action on the judgment at law. The statute was also intended to put an end altogether to the discretion of Courts of equity, in those cases where they had before acted by analogy to

1835.

BERRINGTON
v.
EVANS.

1835.

BERRINGTON
v.
EVANS.

the time limited at law. That was an analogy founded both in law and good sense, but it no longer remains in the discretion of the Court, but is incorporated in the statute. The words of the statute are, that after a certain day, no action, suit, or other proceeding shall be brought, to recover any sum of money secured by any mortgage, judgment, or lien, at law or in equity, but within twenty years after the right shall have accrued. Now I am not prepared to say whether, if I could be satisfied that the bill was filed with *Kemp's* consent, and he meditated, like *Berrington*, to prosecute his claim under that bill—whether, under those circumstances, I should arrive at a different conclusion. Even then, I apprehend, he would have to give a satisfactory reason for remaining so long without calling in the aid of this Court, in his own person. But supposing that he never knew of the filing of the bill, or of the progress of the suit, and that twenty-five years after the right had accrued, upon a new discovery of the suit having been instituted and of funds being in Court, he petitions to be allowed to go before the Master and make his claim, can I say that his petition is not a proceeding in equity within the statute? The statute says that such a claim shall not be made after twenty years, unless in the mean time some part of the money, either principal or interest thereon, shall have been paid, or some acknowledgment shall have been given in writing. These are the only exceptions mentioned in the act. Nothing is said of the case of a bill being filed by one creditor for the benefit of the rest; and I cannot engraft another exception on the act of Parliament. Considering, therefore, that this is a proceeding in equity to recover money upon a judgment upon which twenty years have run, and that it comes within none of the exceptions of the statute, I am of opinion that the claim is barred.

Petition dismissed.

1835.

PRICE *v.* ASSHETON.

July 11, 13.

THIS cause (*a*) coming on for hearing, was argued by Mr. *Simpkinson* and Mr. *Rogers*, for the plaintiff; and Mr. *Twiss*, Mr. *James*, and Mr. *Stuart*, for the defendant.

For the plaintiff, the various authorities were cited which were brought to the attention of the Court on the application for the injunction. It was also contended, that although *Reeve* was dead, who was the witness to the interview which took place between the parties before the letter of *June* 11th, 1823; yet there was sufficient on the face of the letters to raise an implication that the parties intended to renew the lease for twenty-one years. And it was urged, that even if the Court were not entirely satisfied on that point, a reference ought, nevertheless, to be directed to the Master to ascertain what was the term the parties had agreed upon.

On the other side it was contended, that the plaintiff must stand or fall by the two letters written by the defendant; and that the intermediate letter written by the plaintiff could not be taken to form part of the agreement. That by an agreement to renew a lease, it was not necessarily intended that the new lease should be of the same duration as the old, otherwise the same doctrine might be applied, which it never was, to a bill of exchange. Moreover, that the plaintiff's insolvency was sufficient to deprive him of the relief sought by the bill.

As evidence of the plaintiff's insolvency, the defendants tendered certified copies of the schedule, assignment, &c., under the Insolvent Act; which evidence was objected to, on the part of the plaintiff, as not being warranted by the provisions of the 76th section of that act (*b*); and in sup-

Bill for specific performance of an agreement to renew a lease, dismissed; the agreement being too vague and uncertain to be executed by the Court.

The insolvency of the intended lessee is a good ground of objection to a bill brought by him for the specific performance of a contract to renew a lease.

Certified copies of the schedule, &c., may be given in evidence under the Insolvent Act, by parties other than the insolvent or his creditors.

(*a*) See ante, p. 82.

(*b*) 7 Geo. 4, c. 57.

1835.

PRICE

S.

ASSHETON.

port of the objection, *Nicholls v. Downes* (a) was cited. The Court, however, overruled the objection.

At the close of the argument, judgment was given by

ALDERSON, B.—Several points have been made in the course of the argument, upon the question whether or not a specific performance ought to be granted of what is called by the plaintiff in this suit an agreement for renewing a lease. It is not my intention to go through all the objections which have been raised against the plaintiff's claim; but it seems to me that, upon two of them, I ought not to make a decree for specific performance in this case. In order to lay a foundation for such a decree, some definite agreement must be proved to the satisfaction of the Court. Agreements of this sort are certainly not treated in the same manner in equity as at law, so far as regards the evidence required to shew what is or what is not a breach of them; as, for instance, in the case where time is not considered of the essence of the contract in equity, it being always considered so at law. But here, as it appears to me, the difficulty is to find out what was the definite agreement between the parties; and if I do not find upon the pleadings or the evidence some agreement to be executed, I cannot decree a specific performance. Now in this case there is a total failure of any parol evidence. In consequence of the death of one of the witnesses, the plaintiff is not able to give evidence of the arrangement between the parties to which the letter of the 11th of *June* is supposed to have reference. The Court, therefore, can only look at the letters to ascertain the terms of the agreement.

Now it appears from the letter of the 11th of *June*, that there had been a previous conference between the parties, which probably was for the purpose of allowing the lessee

(a) 4 Car. & P. 330; 1 Moody & Rob. 13.

to make alterations in the property which otherwise he would not be permitted to make. The defendant then states that the proposed alterations would cost not less than 280*l.* or 300*l.*; and then he says, "under that supposition I wish you to understand, that at the expiration of the lease granted to Mr. *Atkinson*, I shall not demand a higher rent of you than is at present paid." The agreement, therefore, upon that point simply is, that if the alterations were made by the lessee within the term, the lessor would permit him to occupy the premises afterwards, without demanding additional rent; that he would not, in short, on account of those alterations, raise the market price of a lease of the premises.

The defendant then says, "If at that time it should be considered, upon a fair valuation, that the premises are not worth the rent they now let for, I should not object to grant you a lease at a reduced rent, not taking advantage of such improvements made by you from this time." This is that part of the letter which is supposed to discover an agreement between the parties for a fresh lease; and this I am to suppose to be for twenty-one years, at a reduced rent, to be ascertained from various calculations, which the Court is to make the subject of a decree. It seems to me, that this is infinitely too vague for the Court to act upon. I doubt whether the calculation could be made. The existing lease would not expire till ten years after the letter was written, and all that the defendant appears to say is this—"If you trust me, I will not hurt you; and at the end of the term, I will, under certain circumstances, allow you to remain, and will not raise the rent, if you are a good tenant in the interim." That is not an agreement of which the specific performance can be decreed. If there is not a distinct contract between the parties that one shall do certain acts on his part on condition that the other shall do certain acts on his part, the Court cannot make a decree for specific performance.

1835.

PRICE
v.
ASSHETON.

1835.

PRICE
v.
ASSHETON.

Then follows the letter of the plaintiff, dated the 13th of *June*, and the answer to that letter leaves the understanding between the parties still more vague; at all events, it seems to me to leave the parties exactly where they were. The defendant, in effect, says, "You may safely lay out your money in the premises; you are in the hands of a safe man, and I shall not disturb you if you conduct yourself as a good tenant in the meantime." In fact, the parties made their agreement without reference to all the circumstances that might happen: the agreement also refers to future circumstances. If it be considered that their real intention was, that the renewal of the lease should depend upon the subsequent conduct of *Price*, of which *Assheton* was to be the judge, the arrangement between them becomes more intelligible. But how is the Court to execute an agreement in which no time and no rent are stipulated for; but, on the contrary, where time and rent are left to future regulation?

The other objection which has been raised to the plaintiff's claim is his insolvency. It is admitted to be discretionary with the Court, whether it will accede to an application of this sort made by an insolvent debtor; and that the Court will not compel a landlord to take an insolvent party as his lessee. It appears to me, that the insolvency of the plaintiff is well made out, and that the copies of the documents which have been produced, are sufficient evidence of that fact under the 19th section of the statute, without reference to the 76th. The bill must be dismissed, with costs.

MEMORANDUM.

In the course of *Trinity Term*, his Majesty was pleased to appoint *Basil Montagu*, of *Gray's Inn*, Esq., to be one of his counsel learned in the law.

1835.

JESUS COLLEGE, Oxford, v. GIBBS and Others.

June 8, 15,
July 13.

THIS cause (a) came on for re-hearing, and was argued at great length. The defendants' counsel contended, that there was no rule in equity compelling a defendant to reduce his defence to a single point. That at law duplicity of pleading was not allowable; but that the inconvenience of this rule had been felt, and statutes had been passed to remedy the defect. That, although the defendants suggested the possibility of a real composition, yet they did not abandon their defence by way of modus. That, what was said in the answer as to the real composition, was urged as an argument only, and was not stated as a fact; being, in truth, but a mere suggestion as to what conclusion of law the Court should draw from the previous passage; that it was a bad argument, no doubt, but might therefore be rejected as surplusage. That, after all, a composition real and a modus were substantially the same, although there was some difference in the proof. That here, however, the composition suggested by the defendants was not distinguishable from a modus, inasmuch as it was not alleged to have been made since the time of legal memory, but only by consent of all parties whose consent was necessary, and before the restraining statute of *Elizabeth*. That this was not a case where the defendants, having failed in the first defence, were resorting to a second; but, having succeeded in the first defence, were willing to repudiate the second. In addition to the authorities produced on the former occasion, the following cases were cited and commented upon: *Strutt v. Baker* (b), *Hughes v. Davis* (c), *Wilmot v. Hellaby* (d), *Bishop*

Where the defendants in a tithe suit set up by their answer certain yearly payments as moduses, but insisted that, if the same, for any reason, were not good and valid moduses from time immemorial, they must be taken to have been payable as a good and valid real composition, made with the assent of all parties whose assent was necessary thereto, and before the restraining statute of 13 *Eliz.*:—*Held*, upon a re-hearing, that the allegation as to the real composition was not shaped as stating a fact in the alternative, but only as introducing an argument, and therefore might be rejected as surplusage; and that the defendants, under the circumstances of the case, were entitled to an issue as to the modus.

(a) Ante, p. 145.

(c) 5 Sim. 331.

(b) 2 Ves. jun. 625; 2 E. & Y. 421.

(d) 5 Price, 355; 3 E. & Y. 887.

1835.

JESUS
COLLEGE
v.
GIBBS.

of *Llandaff v. Key* (a), *Ferrars v. Pellatt* (b), *Fryer v. Sims* (c), *Leathes v. Newitt* (d), *Warden and Minor Canons of St. Paul's v. Bishop of Lincoln* (e), *Stokes v. Edmeades* (f), *Norton v. Hammond* (g), *Bree v. Beck* (h), *Bennett v. Peart* (i), *Thomas v. Hughes* (k), *Bennett v. Read* (l), *Hawes v. Swaine* (m), *Clarke v. Jennings* (n), *Pope v. Farthing* (o), *Cockburne v. Hughes* (p), *Mallock v. Browse* (q), *Rudge v. Chapman* (r), *Knight v. Walker* (s), *Twells v. Welby* (t), *Baker v. Warner* (u), *Baker v. Athill* (x), *Attorney-General v. Eardly* (y), *Archbishop of York v. Duke of Newcastle* (z), *Downes v. Moorman* (aa), *Benson v. Humphries* (bb), *Wood v. Strickland* (cc), *Williamson v. Lord Lonsdale* (dd), *Cart v. Hodgkin* (ee), *Bourke v. Isaac* (ff), *Clanricarde v. Denton* (gg), *Jennings v. Lettis* (hh), *Warden and Minor Canons of St. Paul's v. Morris* (ii), *Foxcroft v. Parris* (kk).

The counsel for the plaintiffs relied on the case of

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| (a) 4 Wood, 228. | (u) 3 E. & Y. 1387. |
| (b) Id. 334. | (x) 4 Gwill. 1423; 2 E. & Y. |
| (c) 4 Gwill. 1356; 3 E. & Y. 415. | |
| 1368. | (y) 8 Price, 39; 3 E. & Y. 986. |
| (d) 4 Price, 355; 3 E. & Y. 841. | (z) 1 Wood, 446; 1 E. & Y. 661. |
| (e) Id. 65; 3 E. & Y. 809. | (aa) 2 Wood, 238; 1 E. & Y. |
| (f) 3 E. & Y. 1191. | 803. |
| (g) 1 Y. & J. 24. | (bb) 1 Wood, 155. |
| (h) 1 Younge, 211. | (cc) 2 Ves. & B. 150; 2 E. & Y. 674. |
| (i) 4 Wood, 286. | |
| (k) Id. 332. | (dd) 5 Price, 25; 3 E. & Y. 870. |
| (l) Gwill. 1272; 3 E. & Y. 1338. | (ee) 3 Swanst. 160, n.; 3 E. & Y. 1240. |
| (m) 4 Wood, 313. | |
| (n) 4 Gwill. 1424; 2 E. & Y. 416. | (ff) 2 Price, 299; 3 E. & Y. 737. |
| (o) 1 Younge, 263. | (gg) 1 Gwill. 360; 1 E. & Y. 306. |
| (p) 3 Price, 408; 3 E. & Y. 783. | |
| (q) Ambl. 423; 2 E. & Y. 497. | (hh) 3 Gwill. 952; 2 E. & Y. 129. |
| (r) 2 Wood, 407. | |
| (s) Id. 415. | (ii) 9 Ves. 155; 2 E. & Y. 516. |
| (t) 4 Wood, 133; 3 E. & Y. 1286. | (kk) 5 Ves. 221; 2 E. & Y. 487. |

Leach v. Bailey (a) ; and, after commenting on the various authorities produced on the other side, they contended, that the answer set up inconsistent defences; and that it was clear, that the defendants intended, if they failed in the first defence, to take advantage of the second.

1835.

JESUS
COLLEGE
v.
GIBBS.

ALDERSON, B.—In these cases I have fully considered the arguments addressed to me on the re-hearing. I retain the opinion I expressed before as to the principle which ought to govern me in the decision of the case. I still think, and for the reasons I have before expressed, and which I shall not again repeat, that where an answer states inconsistent defences, it ought not to be allowed. But, on the question, whether this answer, specially framed as it is, does set up inconsistent defences, or whether the latter statement is not put rather by way of argument to the Court than as a fact inconsistent with the former part of the answer, I entertain, upon the re-hearing, considerable doubt. The authorities cited, since the last decision, are strong to shew that much latitude has been allowed in these cases. I think, therefore, that I ought to permit the defendants to try the merits of the case, upon an issue, as to the *modus* set up by them; a course which, but for the formal objection, I should have adopted. It seems to me, that, by reserving the question of costs, I shall be enabled hereafter to do full justice to the parties as to this objection, in case that should ever become material to be considered, and that I was wrong in applying the precedent of the case before Chief Baron *Richards* to the present suit.

July 13/h.

On the subject of a re-hearing, I hope I shall always adopt the language of Lord *Hardwicke* (b), that “it is a greater reproach to a Judge to continue in his error than to retract it.”

Decree accordingly.

(a) 6 Price, 504 ; 3 E. & Y. 953.

(b) 2 Atk. 439.

1835.

July 1, 3, 13.

The words "white tithes" have no general meaning, but are applicable to distinct things in distinct parishes. The meaning, therefore, of those words, as applicable to a particular parish, is to be ascertained only from the usage in that parish.

BECHER v. CLAYE and Others.

THE bill stated that the chapter of the collegiate church of *St. Mary*, of *Southwell*, in the county of *Nottingham*, for a long time past had been, and were at the time of filing the bill, seised and entitled to them and their successors of and unto all and singular the small tithes yearly arising, &c., within and throughout the town and soke of *Southwell* aforesaid; and, being so seised and entitled, the said chapter, by a certain indenture of lease, bearing date the 22nd of *January*, 1795, and whereupon livery of seisin was duly had, demised unto *George Kirkland*, his heirs and assigns, amongst other hereditaments, all those their minute tithes, called the white tithes, yearly from time to time renewing, chancing, and increasing within the town and soke of *Southwell* aforesaid (tithes of geese, pigs, and eggs reserved and excepted), to hold the same unto the said *George Kirkland*, his heirs and assigns, during the lives of the three persons named in the indenture, and the life of the survivor of them.

The bill then stated that the chapter were in the habit of granting separate leases of the tithes of wool and lambs of the town and soke of *Southwell*; and that, by the terms "minute tithes, called the white tithes," mentioned in the lease, were meant all the small tithes, except the tithes of wool and lamb, of the said town and soke.

The bill then set forth the title of the plaintiff, derived under *George Kirkland*, to the tithes comprised in the indenture of lease. It also alleged that he was entitled to have, receive, and take all and singular the small tithes, except the tithes of wool and lamb, and the tithes of pigs, geese, and eggs, yearly arising, &c. in and throughout the town and soke of *Southwell*, and the titheable places thereof, and prayed an account of those tithes, so far as

related to the occupation of the defendants within one of the parishes of the soke, namely that of *Southwell*.

The defendants, by their answers, contended, that, by the words "minute tithes, called white tithes," were meant only small tithes of trifling value, in respect of which ancient compositions, in white money, were paid and payable by the occupiers of lands within the town and soke; and they denied the right of the plaintiff to receive all the small tithes within the soke, except as in the bill mentioned. They admitted that some payments, in lieu of the tithes of hops, had been made to some of the plaintiff's predecessors; but they alleged that this had been done by mistake. They stated, that there had been certain immemorial customary payments made in each year to the chapter, by the occupiers within the town and soke of *Southwell*, which they believed to be the tithes demised by the lease, namely, $1\frac{1}{2}d.$ for each milch cow, and sundry small sums for orchards, gardens, and dovecotes. They stated that the chapter of *Southwell* were not seised either of the rectory or vicarage of *Southwell*, but were merely portionists of certain specific tithes within the town and soke.

To shew the ancient ecclesiastical jurisdiction of the collegiate church of *Southwell*, the plaintiff gave in evidence extracts from *Domesday-book*, a bull of Pope *Alexander 3*, Pope *Nicholas' Taxation*, and the *Nonæ Rolls*. In support of his case, it was likewise proved that the collegiate church had, for 150 years, usually made leases of the tithes of wool and lamb, and of minute or white tithes within the soke of *Southwell*. It was also proved, or admitted, that the vicar of *Southwell* received the small tithes of one farm only in that parish; and that, throughout the rest of the parish, the plaintiff and his predecessors, as lessees of the white tithes, had received the tithes of gardens, orchards, dovecotes, cows, flax, carraway seeds, and rape; and that one of his predecessors had for

1835.

BECHER
v.
CLAYE.

1835.

BECHER
v.
CLAYE.

twenty years received the tithes of hops. The plaintiff's witnesses, with the exception of the chapter clerk, deposed to their belief, that there was no difference, or reputed difference, between the tithes generally known by the name of white tithes, and the small tithes arising within the soke.

Mr. *Boteler*, and Mr. *Duckworth*, for the plaintiff.—Under the words “white tithes,” the plaintiff is entitled to all the small tithes within the parish of *Southwell*, with the exceptions mentioned in the bill. Those words are not to be confined to mere trifling money payments. They may possibly mean small tithes, compounded for by money, but more probably they refer to all the small tithes reserved at *Whitsuntide*, that feast having been always very strictly observed at *Southwell*. A receipt of small tithes, as general and extensive as that which has been proved in this case, has been held to carry all the small tithes: *Manby v. Curtis* (a), *Manby v. Lodge* (b), *Byam v. Booth* (c), *Dent v. Robb* (d).

Mr. *Simpkinson*, (with whom was Mr. *Lowndes*), for the defendants, contended, that, by the words “white tithes,” were meant mere trifling money payments, and not small tithes generally; and, in support of his argument, he cited from the fifth volume of the *Valor Ecclesiasticus*, p. 100, *ad nom. Osbaldwyk*; 158, *Basiforde*; 159, *Tiversall*; 161, *Bulwell*; 167, *Torlaston*; 168, *Granby*; 181, *West Redforde*; 186, *Wynthorp*; 199, *Edyngley*, *N. Tiverton*; 279, *Kyrkanders*; 294, *Crosby*; 295, *Newbygyng*.

July 13th.

ALDERSON, B.—In this case the plaintiff claims, as lessee of the collegiate church of *Southwell*, the small tithes,

(a) 2 Price, 284; 3 E. & Y. 733. (c) 2 Price, 231; 3 E. & Y. 716.
(b) 9 Price, 231; 3 E. & Y. 1052. (d) Ante, p. 1.

with some exceptions, arising within the parish of *Southwell*; and the question is ultimately reduced to this short point, *viz.* what are the tithes included under the description in the plaintiff's lease, by the words "all the minute tithes, called white tithes, within the town and soke of *Southwell*, except the tithes of pigs, eggs, and geese?"

It appears, that, for a very long period of time, going back as far as 1633, the chapter of *Southwell* have demised these tithes, and by the same description, to lessees, and have received the profits arising under such leases. Concurrently with these leases, they have also been in the habit, for as long a period, of granting separate leases of the tithes of wool and lamb arising within the town and soke of *Southwell*.

Now, laying out of consideration the extracts from Domesday-book, the Parliamentary Survey, and other documents of that description, which seem to me to be introduced rather for the purpose of gracing the cause than as being of any use to the parties, I apprehend it cannot be doubted, that the fact of enjoyment for so long a period, as is proved by the production of these leases, is abundant proof of title to these minute or white tithes in the chapter of *Southwell*, and, by consequence, on the additional proof of the lease to the present plaintiff from them, of the plaintiff's title to the same tithes.

The only remaining question, then, is, what are these minute or white tithes? I am fully satisfied by the argument of Mr. *Simpkinson*, and the passages cited by him from the Ecclesiastical Survey, that the expression, white tithes, has no particular or definite meaning, but that it means one thing in one parish, and another thing in another parish. The only criterion, therefore, as it seems to me, is the usage in the particular parish. In the first place, the exception shews that they include tithes of pigs, eggs, and geese, for otherwise such exception would be useless. Then what have been the tithes actually col-

1835.

BECHER
v.
CLAYE.

1835.

BECHER
v.
CLAYE.

lected and paid to the person entitled to those white tithes? If we can ascertain that, in the parish of *Southwell*, we shall, as it seems to me, solve this problem.

In this view of the case, therefore, I exclude any usage in the other parishes within the *soke*. For, as the question depends on usage, and the meaning of the expression varies in each parish, we cannot reasonably transfer the usage in one parish as an argument for the construction of those words in another.

Now, in *Southwell* parish, the usage has been not to collect under this description of tithes wool and lamb, nor the small tithes of the estates belonging to the vicar, nor the excepted tithes of pigs, eggs, and geese; but the lessor has always collected tithes of gardens, orchards, dovecotes, cows, flax, carraway seeds, and rape. This is the evidence; and then we have the additional and important fact that the tithe of hops also has been collected by him for upwards of twenty years. It is said, that this last has been by mistake; but I see no ground for that supposition. The tithe is not claimed even now by any one else; and, if paid by mistake, one would naturally expect that the person so paying it would now be able to tell us who ought to receive it, and for whom he has mistaken the plaintiff.

But in truth there is no such person, for the vicar collects none, except from the estates belonging to him, the rector none at all, and the lessee of the tithe of wool and lamb is clearly not entitled. It seems to me, therefore, that the tithe of hops fell to the lessee of the white tithes, because the white tithes included all the small tithes not specifically apportioned to other persons; and that the continued receipt of this tithe is very strong, to prove that white tithes in this parish have that extensive signification.

Upon the whole, therefore, it seems to me clear that I ought to decree in favour of the plaintiff for the amount he claims, and with costs.

Decree accordingly.

1835.

JOSEPH BALDWIN—Plaintiff;

NATHANIEL WILLIAM PEACH and CHARLOTTE ATKYNS—
Defendants.

June 3, 4.

THE bill, which was filed the 18th *February*, 1835, stated, that the defendant, Mrs. *Atkyns*, being seised in fee of the manor, impropriate rectory, and advowson of *Ketteringham*, and various messuages and estates in that manor and elsewhere in the county of *Norfolk*, did, by an indenture dated the 10th of *October*, 1807, and in consideration of 1200*l.*, grant, for the term of her life, to *William Thompson*, his executors, &c., an annuity or clear yearly rent-charge of 200*l.*, to be issuing out of and chargeable upon the said manor and premises, with the usual powers of distress; but subject to a power of repurchase. That as a further security for the due payment of such annuity, Mrs. *Atkyns* executed to the grantee a bond in the penalty of 2000*l.*, and also a warrant of attorney to confess judgment against her for the like sum, both which securities were of even date with the annuity-deed.

The bill further stated, that *Thompson* died in *November*, 1830, leaving the plaintiff his executor; that at his death the annuity was greatly in arrear; that Mrs. *Atkyns* had for many years been out of the jurisdiction of the Court; and that the defendant *Peach* claimed to be a purchaser of the property comprised in the annuity-deed: and was, at the time of filing the bill, in possession of the premises and in receipt of the rents and profits. That the plaintiff being unable to obtain payment from Mrs. *Atkyns*, had distrained upon the premises; but that it had been subsequently arranged between the plaintiff and *Peach*, that the distress should extend no further than

To a bill filed for payment of a rent-charge, one of the defendants pleaded twenty-six years possession without accounting for or paying over to the plaintiff any part of the rents and profits. Plea allowed; but, under the circumstances, ordered to stand over till a co-defendant had answered, pleaded, or demurred.

Although a bill contain a charge that the defendant has in his custody divers deeds, papers, and documents, by which the truth of the several matters in the bill contained would appear; yet, if it contain no specific allegation to which the charge will apply, the charge need not be answered.

Courts of equity will presume a release within the same limits of time, within which juries will be directed to presume it; whe-

ther any Statute of Limitations is applicable to the case or not.

1835.

BALDWIN
v.
PEACH.

might be sufficient to enable the latter to try the plaintiff's right in an action of replevin. That, notwithstanding this arrangement, the defendant *Peach* had given notice to the under-sheriff not to extend the property by *elegit* at the suit of any creditor of Mrs. *Atkyns*, the property not being extendible by *elegit*, the legal estate being outstanding in trustees to protect mortgages. That both before and since the said notice, the plaintiff, as executor of *William Thompson*, had made various applications both to Mrs. *Atkyns* and *Peach* for payment of all sums of money due in respect of the annuity, but without success.

The bill charged, that if the defendant *Peach* was a purchaser of the manor and premises for a valuable consideration, he had by himself or his attorney notice of the annuity. That the consideration which he gave (if any) consisted either wholly or in part of a rent-charge or annuity to be paid to the defendant Mrs. *Atkyns*; and, further, that if he purchased the premises for a valuable consideration, and without notice of the annuity (which, however, the plaintiff did not admit), the said last-mentioned annuity or rent-charge, and all arrears thereof now due from the said defendant *Peach*, ought to be paid to the plaintiff as such executor as aforesaid, in discharge of the said annuity of 200*l.*, and the arrears thereof.

The bill contained a general charge, that the defendants or their solicitors had in their possession divers deeds, abstracts, accounts, letters, papers, and writings relating to the several matters aforesaid or some of them; and whereby, if produced, the truth of such matters would appear.

The bill prayed for an account of the arrears of the annuity of 200*l.*, and that the same might be raised by sale or mortgage of the premises; that a receiver of the rents might be appointed; and that the defendant *Peach* might be restrained by injunction from receiving the same. But

if the plaintiff were not entitled to that relief, then that the arrears might be paid to the plaintiff out of the annual sum payable by the defendant *Peach* to the defendant Mrs. *Atkyns*; that the future payment of the said annuity of 200*l.* might be secured to the plaintiff; and that, in the mean time, *Peach* might be restrained by injunction from making any further payment to the defendant Mrs. *Atkyns* in respect of the annual sum payable to her as aforesaid.

To this bill the defendant *Peach* pleaded as follows:—

This defendant, by protestation, &c., as to all the relief prayed in and by the said bill, and as to all the discovery thereby prayed, save and except so much thereof as prays this defendant may discover whether he is not now in the possession of the messuages, lands, hereditaments, and premises in the said bill mentioned and of the rents and profits thereof, doth plead in bar, and for plea saith, that he, and those under whom he claims to be entitled to the said estates, have been in the lawful and uninterrupted possession thereof to his and their own use and benefit for twenty-six years last past and upwards; that is to say, from the year 1806 down to the present time, without ever having paid over or accounted for all or any part of the rents and profits thereof to or with the said plaintiff, or the said testator *William Thompson* in the said bill named; and without having paid to or accounted with the said plaintiff or the said testator *William Thompson* for any sum or sums of money in respect of the annuity or rent-charge of 200*l.* in the said bill mentioned (if any such there was) during the whole of that period, nor hath this defendant, or, to the belief of this defendant, have or hath any other persons or person under whom he claims to be entitled to the said estate, ever acknowledged or admitted to the said plaintiff or the said testator, or any person or persons on their or either of their behalf, that any money was due and owing to them or any or either of them for

1835.

BALDWIN
v.
PEACH.

1835.

BALDWIN
v.
PEACH.

or in respect of the said annuity or rent-charge of 200*l.*; and, therefore, that it is to be presumed that such annuity or yearly rent-charge as in the said bill mentioned (if such annuity was ever granted), hath been long since released, or the said estate otherwise discharged therefrom; all which matters and things &c.

Mr. *Boteler* and Mr. *Lynch*, for the plea. — After twenty years' possession, a plea of adverse possession is good: *Mitford*, Pl. 3rd ed. 320; *Beames*, Pl. 247. The present plea is formed on that in *Blewitt v. Thomas* (a), and the circumstances of the two cases are very similar. The charge in the bill that the purchase was made with notice, is covered by the plea, supposing the purchase to have been made more than twenty years before the filing of the bill. The charge that the defendant Mrs. *Atkyns* had been paid either in the whole or in part by an annuity granted by *Peach*, is met by that part of the plea which alleges that *Peach*, and those under whom he claims, have been in possession twenty-six years, without accounting with the plaintiff or his testator. This is a mere legal demand, and the bill might have been demurred to but for the statement of the notice served upon the under-sheriff. By coming here, the plaintiff ought not to be in a better situation than he would have been in at law. At law, he could not have recovered after twenty-six years without proof of any payment or acknowledgment of the annuity within that time. In the *Mayor of Hull v. Horner* (b), a Court of law held, that a grant might be presumed, though within legal memory. [The *Lord Chief Baron*.—Lord *Kenyon* said, he would presume an act of Parliament to corroborate an usage for forty years.] In this respect, as well as in others, equity follows the law: *Bond v. Hopkins* (c), *Hovenden v. Lord Annesley* (d).

(a) 2 Ves jun. 669.

(c) 1 Sch. & L. 429.

(b) Cowp. 102.

(d) 2 Sch. & L. 607.

The decision in *Blewitt v. Thomas* was preceded by several of the same nature relating to mortgages: *Aggas v. Pickerell* (a), *Clapham v. Bowyer* (b), *Frazer v. Moor* (c), *Peacock v. Neale* (d). These, no doubt, were cases of mortgages (e), and not rent charges; but the same principles must apply. In *Cholmondeley v. Clinton* (f), Lord Eldon said, that he could not agree to, and had never heard of such a rule, as that adverse possession, however long, would not avail against an equitable estate, where the holder had undertaken no duty for the party against whom he pleaded the adverse possession. Here the long adverse possession would authorize a Judge to direct a jury to presume that the annuity had been discharged; and, consequently, a Judge in equity is bound to make that presumption: *Emery v. Grocock* (g).

Independently of other considerations, the plaintiff's right is barred by the statute 2 & 3 Will. 4, c. 27, s. 2, which, if it does not apply expressly to Courts of equity, will nevertheless guide their proceedings (h). The possession being adverse, the plaintiff cannot bring himself within the protection of the 15th section.

The case of *Hardman v. Ellames* (i), will be relied upon on the other side. That was a bill brought for the recovery of an estate, and the defendant pleaded adverse possession, but did not inform the plaintiff of the nature of his adverse possession, or how he had acquired it; and the plea was allowed. This is not a bill brought for the recovery of an estate, but to enforce a demand upon it; and the plea here is non-payment for more than twenty

1835.

BALDWIN
v.
PEACH.

(a) 3 Atk. 225.

(b) 1 Ch. Rep. 206.

(c) Bunb. 54.

(d) Rep. temp. Finch. 266.

(e) See the cases upon this subject collected in Matthews on Presumption, p. 329, 330.

(f) 2 Jac. & W. 191; 4 Bligh, 1.

(g) 6 Madd. 57.

(h) And see section 40.

(i) 5 Sim. 640. The report of this case, on appeal, has since been published. See 2 Myl. & K. 732.

1835.

BALDWIN
v.
PEACH.

years. It must be admitted, that in that case there was an allegation that the defendants had in their custody certain deeds and documents by which the truth of the matters alleged in the bill would appear; and the Vice-Chancellor considered that that allegation ought to have been met by answer, and on that ground also he overruled the plea. But then it was also expressly alleged that the defendant had been let into possession and receipt of the rents and profits in the year 1815 (within twenty years before the filing of the bill), and clearly the deeds and documents might explain that fact. Besides, the charge there was, in other respects, more explicit than it is in this case. The Vice-Chancellor did not decide that a general and vague allegation as to deeds and documents requires an answer. In *Macgregor v. The East India Company* (a), he decided the contrary. *Thring v. Edgar* (b), also supports that decision.

Mr. *Twiss* and Mr. *Hayter*, for the bill.—The authorities cited on the other side are not sought to be impeached. If the Statutes of Limitations were applicable, the 15th section of 3 & 4 *Will.* 4, c. 27, would protect the plaintiff; because that applies to cases where the receipt of rent has not been adverse to the claimant's title. Here there is no pretence for saying that there has been an adverse possession of rent. An adverse possession of *A.*'s rent would arise if the terre-tenant were to pay it over to *B.*; but that is not the case here. No person has had the adverse possession of the rent here claimed. The Statutes of Limitations do not apply to this case. The only case in which Courts of equity have acted by analogy to those statutes, is in the case of the statute of *James* (c).

(a) 2 Sim. 452.

(b) 2 Sim. & Stu. 274.

(c) Stat. 21 Jac. 1, c. 16.

That statute is not applicable here. The statute 32 *Hen.* 8, c. 2, s. 3, gives fifty years to the claimant of a quit rent; but, with respect to a rent-charge, even that statute has been held inapplicable: *Foster's case* (a), *Collins v. Goodall* (b). [The *Lord Chief Baron*.—At the time *Foster's case* was decided, the notion was, you could not plead a deed without making a profert; afterwards it became allowable to plead that the deed had been lost by time and accident; and the Judge directed the jury, that if they thought there was a reasonable ground to presume there was a release, they should find a verdict for the party who so pleaded. When this first became the practice, Lord *Eldon* made many questions about it, but at last acceded to it. Suppose, that in this case (there being no trust) you had distrained; that the goods had been replevied; that an action of replevin had been brought, and an avowry made by reason of the rent-charge in arrear: and suppose the plaintiff in replevin had put in a plea in which he stated that, true it was, that by the deed mentioned in the avowry such a rent-charge was granted, but soon afterwards the annuity was redeemed; and that by another deed, lost by time and accident, and to which the annuitant was a party, the estate was altogether released: in such a case, the plaintiff would not be bound to make profert of the deed of release, but would give evidence that for twenty-six years there had been no payment under it; and would not the Judge direct the jury to presume a release? I am not sure whether this modern improvement in pleading might not have put an end to writs of right without the aid of the legislature.] At all events, *Foster's case* takes a claim of this nature out of the Statutes of Limitations: *Selwyn, N. P.* title “*Replevin*.” Upon the mere statutes the defendants are out of Court. Then, if

1835.

BALDWIN
v.
PEACH.

(a) 8 Rep. 64.

(b) 2 Vern. 235.

1835.
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 BALDWIN
 v.
 PEACH.

they rely on length of time, independently of the statutes, they ought to allege special circumstances, giving length of time its effect. They must shew that something has occurred beyond the mere lapse of time required by the statutes. The Court will not create what is equivalent to an equitable bar. [The *Lord Chief Baron*.—Supposing a person had granted a lease for fifty years, and had never received rent for that time, would not a Judge direct a jury to presume a release of it? Or, suppose, after twenty-four or twenty-five years, a landlord never having received any rent at all, had brought ejectment against his tenant, would not length of possession have been a bar to that action? The term of twenty years for barring these demands has been adopted from the statute both by Courts of law and of equity. In a late case (*a*), a bill was brought to recover a legacy which had been left by a testator more than twenty years before; and Lord *Brougham* held, that the legacy must be presumed to have been satisfied. I do not say whether, under all the circumstances of that case, I should have agreed with the decision; but I should say, that, upon the general principle, his Lordship was right.] There is no adverse possession of the rent-charge in this case; and, therefore, the only statute from which any analogy can be raised is, the 32 *Hen.* 8, c. 32. But in *Eldridge v. Knott* (*b*), it was held under that statute, that mere length of time, short of the fifty years, unaccompanied with circumstances, was insufficient to raise a presumption of release. In *Smith v. Clay* (*c*), Lord *Camden* said, that the time of limitation could not be defined, but must be governed by circumstances. In *Cholmondeley v. Clinton* (*d*), the statute on which Lord *Eldon* founded his judgment was applicable to the nature of the case.

(*a*) *Campbell v. Graham*, 1
 Russ. & Myl. 453.

(*b*) *Cowp.* 214.

(*c*) *Ambl.* 645; 3 *Bro. C. C.*
 639.

(*d*) 4 *Bligh*, 1.

Busby v. Lord Salisbury (a), *Deloraine v. Brown* (b). If mere length of time were sufficient for the defendant, he could have demurred; but that is not allowed: *Mitford*, Pl. 213, 4th ed.

1835.
BALDWIN
v.
PEACH.

There are other material objections. The bill alleges that the defendant *Peach* was a purchaser for a valuable consideration without notice; and that not being denied, the plea must be overruled: *Wynn v. Williams* (c). Besides, the plaintiff is entitled to the discovery of the annuity alleged to be paid by *Peach* to Mrs. *Atkyns*. The plea ought to extend to the acts of Mrs. *Atkyns* as well as of *Peach* himself: *Jones v. Davis* (d). It ought to rebut every circumstance from which it may possibly be inferred that the annuity remains. Now, it is said that the defendant *Peach*, and those under whom he claims, have been in the lawful and uninterrupted possession for twenty-six years, without having paid or accounted for any part of the rents and profits to the plaintiff. That, however, is not a complete defence; because, payment may have been made without their being in possession. Payments may have been made by Mrs. *Atkyns* since her possession. In *Blewitt v. Thomas*, the defendant or his ancestors were in possession the whole time. [The *Lord Chief Baron*.—No doubt it is sufficient for the mortgagor to say that he has been many years in possession without accounting to the mortgagee. On the other hand, in this case of an annuity, the money might be paid voluntarily, and not out of the rents and profits. So far, therefore, the plea is open to ambiguity, because payments might have been made while the parties were out of possession. But then it goes on thus—“And without having paid to or accounted with the plaintiff for any sum or sums of money in respect of the said annuity.” Now, to make out

(a) Rep. temp. Finch. 256.

(b) 3 Bro. C. C. 633.

(c) 5 Ves. 130.

(d) 16 Ves. 262.

1835.
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 BALDWIN
 v.
 PEACH.

the plea to be bad, you have to satisfy me that those words are only referrable to the period of time when the defendants were in possession.] Those words are governed by the preceding sentence. They occur in *Blewitt v. Thomas* precisely as they do here, and refer exclusively to the possession.

That part of the plea is insufficient, which states the defendant's *belief* that those under whom he claims have not made any acknowledgments of any money due on the rent-charge. With respect to the defendant *Atkyns*, presumption of payment cannot be raised in her favour; the bill alleging that she has been for years out of the jurisdiction: *Newman v. Newman* (a). [The *Lord Chief Baron*.—It is not alleged that she was the whole time out of the jurisdiction. Besides, the plaintiff had his remedy against the estate.]

Lastly, the defendant should have answered the charge as to the books, papers, and documents: *Hardman v. Ellames* (b). We say, that if he had produced those letters, it would have appeared that he had notice of this annuity, and that he now pays an annuity to Mrs. *Atkyns*. [The *Lord Chief Baron*.—The words "several matters aforesaid" contained in the charge, must mean the several matters stated in the bill. But the bill states them very loosely. There is no statement that *Peach* bought the estate subject to the rent-charge, though there is an allegation that he had notice of the incumbrance. Having notice is one thing; buying the estate subject to the rent-charge is another. If there had been an allegation that he had bought subject to the rent-charge, I should have said the plea was no answer to the bill.]

Mr. *Boteler*, in reply.—The only question is, whether the defendant has sufficiently shewn by his plea that

(a) 1 Stark. 101.

(b) 5 Sim. 640.

1835.

BALDWIN
v.
PEACH.

nothing has been paid in respect of the annuity within twenty-six years. It is said, that it ought to have been alleged that nothing was paid within that time by Mrs. *Atkyns*. *Blewitt v. Thomas* is precisely this case. The mortgagor bequeathed the mortgaged property to his wife for life; and, after her death, to his children. The claim was made against the children, and they pleaded nonpayment by them or their ancestors. Now, payments might have been made by the widow in her lifetime, and by her administrator *de bonis non*. It was, therefore, quite as necessary to state that payment was not made by the personal representative of the mortgagor, as it is necessary to state here that there was no payment by Mrs. *Atkyns*. Supposing, however, such an allegation to be necessary, there is sufficient matter in the plea to answer that purpose. Granting that the express statement of nonpayment is to be confined to the period of possession, what will be said of the allegation that no acknowledgment was ever made of the annuity? If there was no acknowledgment, there was no payment. [The *Lord Chief Baron*.—Suppose Mrs. *Atkyns* had paid the annuity within the last fifteen years, would not that bind *Peach*? You only deny that as to your belief.] They might take issue on that fact, though the plea were allowed in law. Where a plea is put in on oath, some circumstances must be stated on belief. The corresponding part of the plea in *Blewitt v. Thomas* rests on belief only.

The LORD CHIEF BARON was of opinion that the plea must be allowed in point of law; but, inasmuch as the averments in it were not positive as to the acts of Mrs. *Atkyns*, he ordered that it should stand over, and that the defendant *Peach* should be restrained by injunction from paying any thing to Mrs. *Atkyns* till she had appeared and answered, pleaded, or demurred.

1835.
 BALDWIN
 v.
 PEACH.
 Nov. 23rd.

In consequence of this decision, the defendant, Mrs. *Atkyns*, put in a plea, in substance the same as that of the defendant *Peach*. This having been submitted to by the plaintiff, and he having obtained an order to amend his bill,

Mr. *Simpkinson* and Mr. *Bichner*, for the defendant Mrs. *Atkyns*, now moved to dissolve the injunction.

Mr. *Twiss* and Mr. *Hayter*, for the plaintiff, opposed the motion.

The LORD CHIEF BARON.—I cannot take notice of the amendments now. The object of the injunction was to make Mrs. *Atkyns* put in a plea or answer. It would not have been granted if she had in the first instance pleaded the same plea as the defendant *Peach*. She has now pleaded; and it is admitted, that it does not appear by that plea that she was liable. Therefore, discharge the order of *June*, so far as relates to the injunction.

Injunction dissolved.

June 12, 16.

BOWLES v. ORR and Others.

A foreign judgment being equally conclusive against the debtor as an *English* judgment, may be set aside in

equity for fraud. Therefore, where a bill was brought against a banker by his customer for an account, and for an injunction to restrain an action on a foreign judgment obtained by the banker from the customer in respect of their mutual dealings, and it appeared by specific allegations in the bill, that, notwithstanding the judgment, the balance of accounts was in favour of the customer:—*Held*, that the case made by the bill was *prima facie* a case of fraud in the banker, which he was bound to answer; and, consequently, his demurrer was overruled, without reference to the question whether the bill was sustainable for the account.

A bill for an account will lie against a banker by his customer.

A mere general charge that accounts are intricate and cannot be taken without the assistance of a Court of equity, is not sufficient to sustain a bill for an account, unless the bill state circumstances from which it may fairly be presumed that the charge is true.

the plaintiff and other persons, on his account, various bills of exchange drawn on *England* and elsewhere; and also other securities for money, and also cash and money to a very large amount. That the defendants discounted or sold at *Paris* the said several bills of exchange and other securities, and received the produce thereof for or on account of the plaintiff. That the plaintiff at different times, between the 26th of *October*, 1829, and 25th of *May*, 1830, drew out of the hands of the defendants various sums of money; and that the defendants, at different times, paid several sums of money on account of the plaintiff pursuant to his written orders; and also made other payments to a considerable amount for or on account of the plaintiff. That, during the whole of the period aforesaid, an open unsettled account to a very large amount, consisting of numerous items on both sides, existed between the plaintiff and the defendants.

The bill further stated, that the defendants never rendered to the plaintiff any full account of their receipts and payments on his behalf; and that, if such an account were taken, it would appear that there is now due and owing to the plaintiff, from the defendants, on the balance of accounts, the sum of 150,000 francs and upwards, which sum is of the value of 6,000*l*.

The bill then set forth an account delivered by the defendants to the plaintiff in *May*, 1830, by which the plaintiff appeared to be their creditor to the amount of 55,000 francs. The bill then charged that this account was in many respects false and fraudulent. That, besides other pretended payments, the defendants allege that some of the sums charged in the said account were paid in satisfaction of losses incurred in making certain purchases or sales of stock in the public funds of *France* on account of the plaintiff; whereas, if any such purchases or sales of stock were ever made, they were made without

1835.

BOWLES

v.

ORR.

1835.
BALDWIN
v.
PEACH.
Nov. 23rd.

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exceeding the amount of the judgment. When a judgment is recovered at law upon an insulated part of an account, the defendant at law has a clear right to come here for an account, alleging that, notwithstanding the judgment, a balance is, in fact, due to him.

It is admitted, by the demurrer, that a balance is due to the plaintiff; but the defendants say that he might prove it at law. Before your Lordship will say this, you will look at the relative situation of the parties. The defendants were not only the plaintiff's bankers, but his agents, to receive, pay, and invest money, and to appropriate and apply the different bills of exchange put into their hands. There is no authority to shew that a customer cannot file a bill against his banker. A steward is only a minor description of agent, yet a bill will lie against him. A banker is trusted to a far greater extent. In *France*, however, the bankers are not deposit bankers; they deal, not in cash or cheques, but in bills of exchange; they are in the situation of accountable agents or stewards, receiving money from other persons on behalf of their customers. Unless, therefore, they were compellable to account in equity, there would be no mode of calling them to account. The reasoning of Lord *Eldon*, in *Dinwiddie v. Bailey* (a), does not apply to this case, which is that of a bill filed by a principal against his agent. There the bill was filed by a broker against the insured; and Lord *Eldon* said, that, as the plaintiff had evidence in his possession sufficient to support his case at law, he ought not to have come into equity. In *King v. Rossett* (b), *Alexander*, C. B., held, that the bare relation of principal and agent was not sufficient to bring parties into a Court of equity, if they had their remedy at law. But there the question related only to one item, namely, 400,000*l.* stock. His Lordship did not determine that,

1835.

BOWLES

v.

ORR.

(a) 6 Ves. 136.

(b) 2 Y. & J. 33.

1835.

BOWLES
v.
ORR.

where a series of items in an account between a banker and his customer is in dispute, the principal cannot come into this Court for redress. 1 *Eq. Abr.* 5, *pl.* (1), and *Mitf. Pl.*, 4th ed. 159, are authorities in favour of the plaintiff. *Mackenzie v. Johnston* (a) was no more a case of trust or confidence than the present. Here, the breach of confidence alleged and admitted is, that the defendants attempted to debit the plaintiff with losses from time bargains. [The *Lord Chief Baron*.—They could not charge him at law with that, because they must prove their authority in each particular case.] Supposing even that they could prove their authority for each item, the accumulation of items alone would give the Court jurisdiction: *Freshfield v. Lee* (b). Each transaction involves a question of account. Besides, by demurring, they admit the allegation in the bill that the accounts are intricate, and can only be taken in a Court of equity.

Mr. *Stuart*, in reply.—There is nothing to change the jurisdiction from law to equity. In matters of account, Courts of law and equity having concurrent jurisdiction, it is not usual that, after proceedings have been had in one Court, and it has fairly possessed itself of the subject in dispute, another Court should be called upon to interfere. That has been repeatedly held as between Courts of equity and the ecclesiastical Courts, in relation to testamentary matters: *Nicholas v. Nicholas* (c). Can it be said that a Court of law cannot adjudicate between these parties? It is childish to say that general allegations, as to the intricacy of the accounts, and others of the like nature, will bring the case within the jurisdiction of this Court. Besides, general allegations are controlled by particular

(a) 4 Madd. 373.

(b) Not reported.

(c) Pre. Cha. 546.

statements; and here the account set forth in the bill contains but a few items, and contradicts the allegation of intricacy. *Assumpsit* will lie to recover the balance of a banking account: *Tomkins v. Wiltshire* (a). The plaintiff, therefore, should have shaped his case for discovery and not relief: *Frietas v. Dos Santos* (b).

1835.

BOWLES

v.

ORR.

The LORD CHIEF BARON.—My opinion is, that the demurrer must be disallowed. If this were a bill filed merely in respect of a single item, of course it would be absurd to suppose that a Court of equity would exercise its jurisdiction in relation to that one item, and the case would come within the principle of *King v. Rossett*. There the plaintiff in equity intrusted his stockbrokers with a sum of 40,000*l.* stock for sale. The stock was sold, and afterwards repurchased; and, according to the statement in the bill, the amount of the sale and purchase was finally closed, and a balance claimed by the defendant. Now it is quite obvious that, if the defendant had brought his action for that balance, his stated account might have been negatived at law. At all events he could not have established that balance without shewing either a discharge of sums due from him, or a settled account. Under these circumstances the Chief Baron thought that the facts of the case did not require the interference of a Court of equity.

Again, in *Frietas v. Dos Santos*, the action was brought by principals living abroad, to recover the produce of specie consigned to their factors in *England* for sale, and the factors filed a bill against their principals for an account and an injunction, alleging that the parties had had various dealings, and that mutual accounts subsisted between them. The Chief Baron's judgment in

(a) 1 Marshall, 115.

(b) 1 Y. & J. 574.

1835.

BOWLES
v.
ORR.

that case does indeed appear to shew, that, if an account had been alleged to exist, requiring settlement, the bill would have been allowed. But, after adverting to the difficulty he had as to how far the general charges in that bill entitled the plaintiff to relief, he says—"Now, without laying down any general rule, I think the facts charged in the present bill are too loose and vague to support it; not even stating that there are unsettled accounts, or that a balance is due to either party." Now, what is the meaning of that? I am glad to find an authority for the opinion I entertain upon this point. I consider a general charge as nothing more than a general charge. A mere general charge of intricate accounts is not to be received as admitted. The demurrer is no more an admission of such accounts, than it is of general combination and conspiracy. No facts are admitted by it, but those expressly stated. The judgment of the Chief Baron was right, and had the effect of preventing the farther interposition of delay, which, from the nature of the case, the factors might have had their account in creating.

In *Dinwiddie v. Bailey* (b), an insurance broker filed his bill against the insured, stating in a general way the several transactions on which the bill was founded, and praying an account. Those who look at the relation of the parties, will see that the bill, under the particular facts of that case, could only have been filed for delay. What is an insurance broker's duty? While he effects policies, he gives the underwriters credit for their premiums, and charges losses against them, and keeps the accounts. Now, though there may be very proper reasons for filing a bill against the person who keeps the account, what right has he to ask the underwriters for an account?

But this case goes farther. A fact is stated in the bill which requires a very explicit answer. It is this—it is first stated that no account has ever been de-

(a) 6 Ves. 136.

livered to the plaintiff, except that account, upon the face of which it appeared that 55,000 francs were due to him. Secondly, it is stated that no account has since been rendered to him, and then that a judgment was obtained by the defendants against him at *Paris*, for the balance alleged to be due to them. What, then, is admitted by the demurrer? It is admitted, that, after an account stated had been delivered to the plaintiff, in which they had made the plaintiff a creditor, a judgment was obtained by them against the plaintiff upon an alleged balance, and that the object of the action is to enforce that balance.

Under these circumstances an important consideration arises. A judgment obtained by a creditor abroad has been held to be conclusive in this country; therefore, like any other security available in this country, it will be affected by fraud. Perhaps it might be said, that, upon shewing a strong case, the party might defeat the judgment, even at law; but was it ever doubted that a bill might be filed in equity to be relieved against a judgment, or any other security, obtained by fraud? Now here, is it not stated to have been obtained, when the persons who obtained it were the debtors? It may turn out otherwise; but the record shews a *prima facie* case of fraud, which it would be difficult to unravel at law. The demurrer having admitted that, it goes far towards solving the question, whether the principal on the one side, or the agent on the other, is, under present circumstances, entitled to be relieved in this Court.

I do not lay down the general proposition that every account involving various items, and requiring explanation, may or ought to be the subject of inquiry in a Court of equity; but I apprehend that this is a fit case for such inquiry; and I own I was surprised to hear it stated that no relief could be had in this Court in respect of a banker's account. No authority was produced for that state-

1835.

BOWLES

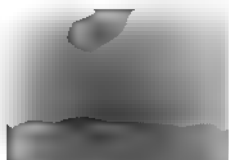
v.
ORR.

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œuvre to avoid our answer, it being admitted that they could give a better account than *Fladgate*. *Prince v. Haydin* (a) is an authority against the present motion. [The *Lord Chief Baron*.—If the decision there is right, it is a very strong case.]

1835.

BOWLES
v.
ORR.

Mr. *Twiss*, in reply.

THE LORD CHIEF BARON.—The demurrer looks like anxiety on the part of the two defendants to avoid discovery; and yet I am asked to consider the case so conclusive, that no discovery is necessary. I cannot accede to that. Besides, there is great danger in deviating from the general practice. If this motion be allowed, how do I know that on future occasions it will not be argued that in all cases where the defendants in equity are abroad, they may be allowed to proceed in their action at law? On the other hand, I feel the force of the observation, that where a bill is filed against several defendants, and some of them are abroad, a Court of equity will not on that account continue an injunction in favour of a plaintiff who has no equity whatever. I am free to say I do not go the length of Chief Baron *Alexander* in this respect. I think the decision in *Prince v. Haydin* very questionable.

No order was made.

(a) 3 Y. & J. 190.

1835.
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 BOWLES
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 to grant
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 dissolve
 injunction.

1855.

TREDWELL
v.
BYRCH.

surplus in the public funds, in the names of the
of the borough, in trust to pay the dividends
the commissioners, to be applied by them from
and at all times after such investment, in aid
and assessments to be made and levied by
not in the respective parishes of *All Saints*
ence only.

which, under a provision in the act, was filed
clerk of the commissioners only, alleged that
was an inhabitant of the parish of *All*
and as such had been rated and assessed to the
and assessments made by the act, and had
rates which had become due from him. It then
various acts of misconduct on the part of
missioners; and, amongst others, that the bill of
procuring the act of Parliament was too high,
never been taxed; and that one of the commis-
was himself the solicitor who made out and re-
the amount of the bill. It likewise charged that
missioners had not invested the purchase-mones
manner directed by the act, and that they had
d part of such monies for the benefit of the parish
Angeworth, which parish was not entitled to the bene-
creof.

The bill prayed an account of the purchase-mones re-
ed, or which ought to have been received, by the
missioners or their clerk; that the bill of costs for
curring the act of Parliament might be taxed; and that
e overplus of the purchase-mones, after payment of
uch bill, might be ascertained and invested pursuant to
he act of Parliament, &c.

A motion was now made, on the part of the defendant,
to stay all proceedings in the cause until the plaintiff
should find security for costs, upon affidavits shewing the
plaintiff's insolvency, and that he was the mere tool of
the attorney who professed to conduct the suit for him.

1835.

June 12th.

TREDWELL v. BYRCH.

A suit instituted for the purpose of regulating and apportioning a rate levied on the inhabitants of a parish under an act of Parliament, ought to be by information and bill, and not by bill only; therefore, a person who had filed a bill for this purpose on behalf of himself and all other the rated inhabitants of the parish, upon affidavits being made of his insolvency, was ordered to give security for costs.

AN act of Parliament passed in the fifth year of his late Majesty, for paving, cleansing, lighting, watching, regulating, and improving the borough of *Evesham*, and for repairing, improving, and maintaining the bridge over the river *Avon*.—The act, after reciting that the borough of *Evesham* consisted of the parishes of *All Saints*, *St. Lawrence*, and *Bengeworth*, and that there were within the parishes of *All Saints* and *St. Lawrence*, several pieces of common and waste lands, and that it had been agreed that the same should be sold, and that the monies to arise from such sale should be applied in aid of the sums necessary to be raised for the purposes of the act, empowered certain commissioners therein named, when and so often as they should think necessary, to make one or more rate or rates, assessment or assessments, in every year, upon the tenants or occupiers of dwelling-houses, &c., within the borough, such rate or rates, assessment or assessments, not to exceed in any one year the several sums therein particularly mentioned. Provided always, that it should be lawful for the commissioners, and they were thereby required, to apportion the rates to be from time to time assessed and imposed by virtue of the act on the several parishes in the borough, so as that each parish might bear an equal share of such rates and assessments, in proportion to the extent of improvements necessary. And it was further enacted, that the several common lands in the parishes of *All Saints* and *St. Lawrence*, specified in the schedule to the act, should be and were thereby vested in the commissioners, who were authorized to sell the same in manner directed by the act, and to receive the purchase monies. And it was further enacted, that the commissioners, after deducting from the purchase-monies a sufficient sum for defraying the expenses of the act, should

invest the surplus in the public funds, in the names of the mayor &c. of the borough, in trust to pay the dividends thereof to the commissioners, to be applied by them from time to time, and at all times after such investment, in aid of the rates and assessments to be made and levied by virtue of the act in the respective parishes of *All Saints* and *St. Lawrence* only.

The bill, which, under a provision in the act, was filed against the clerk of the commissioners only, alleged that the plaintiff was an inhabitant of the parish of *All Saints*, and as such had been rated and assessed to the annual rates and assessments made by the act, and had paid all rates which had become due from him. It then charged various acts of misconduct on the part of the commissioners; and, amongst others, that the bill of costs for procuring the act of Parliament was too high, and had never been taxed; and that one of the commissioners was himself the solicitor who made out and received the amount of the bill. It likewise charged that the commissioners had not invested the purchase-monies in the manner directed by the act, and that they had applied part of such monies for the benefit of the parish of *Bengeworth*, which parish was not entitled to the benefit thereof.

The bill prayed an account of the purchase-monies received, or which ought to have been received, by the commissioners or their clerk; that the bill of costs for procuring the act of Parliament might be taxed; and that the overplus of the purchase-monies, after payment of such bill, might be ascertained and invested pursuant to the act of Parliament, &c.

A motion was now made, on the part of the defendant, to stay all proceedings in the cause until the plaintiff should find security for costs, upon affidavits shewing the plaintiff's insolvency, and that he was the mere tool of the attorney who professed to conduct the suit for him.

1835.

TREDWELL
v.
BYRCH.

rishioner and insolvent, and he institutes a suit on behalf of all the parishioners, in order to obtain a common benefit. If they succeed, they can get no costs; and if they fail, the defendants, as the suit now stands, will be deprived of their costs. The suit, therefore, in its present shape, cannot be entertained, and the motion must be granted.

What would have been the effect of a discussion upon the demurrer, I do not know. At present my impression is, that this case falls within the principles of the *Attorney-General v. Heelis*. It may possibly be a fit case to be brought before the Court, but the plaintiff must apply to the Attorney-General for that purpose.

Motion granted.

Nov. 17th.

Plaintiff, who, under circumstances, had been ordered to give security for costs by reason of his insolvency, but who had not complied with the order, was ordered to give that security within ten days, or his bill to be dismissed.

THE order made in pursuance of the above motion, and dated *June 12th*, not having been obeyed by the plaintiff, Mr. *Temple* now moved that the plaintiff might within ten days from the date of the order to be made upon the present motion, give the requisite security for costs, or that the bill might be dismissed. He cited *Camac v. Grant (a)*.

Upon the production of an affidavit of service of notice of this motion upon the plaintiff's clerk in court, the LORD CHIEF BARON made the order as prayed.

(a) 1 Sim. 348.

Mr. Parker, *contrà*.—This is the first application of this nature that has been made. The case of the defendant was made out only through those who are directly interested in defending the suit. The plaintiff is a poor man, and has been oppressed in regard to the rates by the acts of the defendant. On a bare charge of insolvency, and after he has deprived himself of the right of demurrer, the defendant comes here to stop the progress of the suit. In *Pennington v. Alvin*, the Court reprobated the conduct of the next friend, who was the paramour of the wife. In this case, all the inhabitants are interested, though one takes upon himself the onus of the suit; but it is not, therefore, less perfect in its frame, nor has the legislature required that all the inhabitants should be parties. It has long been established, that the mere insolvency of the plaintiff will not warrant an application that he should give security for costs: *Turner v. Turner* (a), *Squirrel v. Squirrel* (b), *Anon.* (c), *Baddeley v. Harding* (d).

1835.

TREDWELL
 v.
BYRCH.

Mr. Temple, in reply, was stopped by the Court.

The LORD CHIEF BARON.—All the arguments of **Mr. Parker** would apply with irresistible force in cases where individuals are suing in their own right. This case is analogous to that of an information by the Attorney-General, acting on behalf of various persons. When he files an information under such circumstances, he does not give security for costs; but the persons who are really interested are obliged to find relators, who are answerable in that respect. This is nearly that case, and ought to be governed by the same principles. The plaintiff is a pa-

(a) 2 P. W. 297.

(b) *Id.* note.

(c) 2 Taunt. 61.

(d) 6 Madd. 214.

1835.

PROSSER
v.
EDMONDS.

Poplar, at a fair valuation. That *Robert* should have a similar right in regard to his estates at *Benhill*; and that it should be lawful for the trustees to allow any of his children the pre-emption of any other parts of his property which he or she might desire, at a fair valuation; but that the trustees should not be prevented from disposing of his property by reason of such pre-emption longer than twelve calendar months after the testator's decease. The testator then appointed *Thomas Edmonds* and *Richard Hughes* to be the executors of his will.

Upon the testator's death, the executors proceeded to execute the trusts of the testator's will, and to administer his estate; and they set apart 11,600*l.* consolidated Bank Annuities, for the purpose of paying the annuities bequeathed by the will. In *August*, 1828, they delivered their final account as such trustees and executors, to *William* and *Robert Todd*, who thereupon signed the account, and gave releases to the executors.

In *March*, 1829, *William Todd*, by an indenture, assigned his reversionary one-third share in the sum of 11,600*l.* consols, to the defendant *Edmonds*, subject to a power for the re-purchase of the same within ten years. In *June* of the same year, he by an indenture assigned to his brother *Robert Todd* his one-third share in the testator's residuary personal estate; and also his power of re-purchase reserved to him by the last-mentioned indenture. He made no actual conveyance to *Robert Todd* of his interest in the real estate; but it was alleged by the bill that this indenture of assignment was intended to have that effect.

By virtue of several indentures, dated in *June* 1829, and *April* 1830, and executed between *Robert Todd* and the defendant *Edmonds*, the whole of the interest in the testator's property which *Robert Todd* had purchased of his brother, and also his own one-third share in the testator's residuary estate, became vested in *Edmonds*, *Robert*

Todd retaining only his reversionary one-third share in the 11,600*l.* consols.

In *March*, 1833, *Robert Todd* having opened a banking account with Messrs. *Williams, Deacon, & Co.*, executed to them a conditional assignment of his reversionary interest in the 11,600*l.* consols, as a security for all monies advanced or to be advanced to him by that firm. As a further security to Messrs. *Williams & Co.*, *Robert Todd*, in the following month, executed to them a similar assignment of all his interest in the property devised and bequeathed by the testator, whether present, expectant, reversionary, contingent, or otherwise, and to which he or any person or persons in trust for him might be entitled in any manner howsoever, or might recover by virtue of any suit or action to be commenced or prosecuted against the executors or trustees of the said will.

Again, in *June* 1834, *Robert Todd* being indebted to Messrs. *Gramolt* in a sum of 300*l.*, as a security for that debt, executed to them a conditional assignment of all his interest under his father's will, and all his interest in *William Todd's* share, subject to the prior incumbrances.

In consequence of the two assignments made by *Robert Todd*, of his interest in his father's residuary estate, first to *Edmonds*, and secondly to *Williams & Co.*, these several parties entered into an arrangement, the consequence of which was an indenture dated the 12th of *May*, 1834, and made between *Williams & Co.* of the first part, *Robert Todd* of the second part, and *Edmonds* and *Hughes* of the third part, by which *Williams & Co.*, at the request of *Robert Todd*, released to *Edmonds* and *Hughes* all claims which they, *Williams & Co.*, might have upon the testator's estate, except as to the reversionary interest of *Robert Todd* in the annuity fund.

Lastly, by indentures of lease, and assignment and release, dated respectively the 4th and 5th of *September*, 1834, and made between *Robert Todd* of the first part,

1835.

PROSSER

v.

EDMONDS.

1835.

PROSSER
v.
EDMONDS.

Herbert George Jones of the second part, and the plaintiffs of the third part, reciting that *Robert Todd* was indebted to *Jones* in the sum of 1600*l.*, and to the plaintiff *Howard* in 500*l.*, and to the several persons named in the schedule to the assignment in the several sums annexed to their names; and reciting that an arrangement had been made at the instance and request of *Robert Todd*, by which the plaintiffs had become personally responsible for the payment of the said several sums, with interest: it was witnessed, that for these considerations, *Robert Todd* granted, released &c., to the plaintiffs and their heirs, certain real estates therein specified, (which were, in fact, comprised in the testator's will); and also assigned to the plaintiffs, their executors &c., all the stocks, funds, securities, and personal estate to which he was entitled, in possession, remainder, or expectancy, under his father's will, upon trust to sell the real estate, and to convert into money such part of the personal estate as was convertible, and out of the proceeds, upon trust, in the first place to pay certain costs and expenses mentioned in the said deed of assignment; and in the next place, to pay to the plaintiff *Howard* the said sum of 500*l.*, with interest, and then to retain to themselves, the plaintiffs, the several sums of money which they should have paid, or become responsible to pay, to the said *Herbert George Jones*, and the several other creditors of *Robert Todd*, whose names were specified in the schedule thereunder written, with interest as therein mentioned, and to pay the residue (if any) to *Robert Todd*.

In consequence of this indenture, the debts due from *Robert Todd* to Messrs. *Williams & Co.*, and to Messrs. *Gramolt*, together with the securities on which they were invested, and all powers for the recovery of the same, were assigned to the plaintiffs, in consideration of payment by them of the debts due from *Todd* to those respective parties.

The plaintiffs having brought their bill against the

executors and *Robert Todd*, (the latter having refused to join as plaintiff), to have the benefit of the foregoing securities, and to set aside the transactions between *Robert Todd* and the defendant *Edmonds*, on the ground of fraud; the defendants, the executors, pleaded in bar of the suit the release of *May*, 1834. This plea was submitted to, and the bill amended, by stating the release, and charging that it was obtained by fraud and duress.

The amended bill also charged that the account delivered by the executors to *Robert Todd* was erroneous and fraudulent, and that he signed it under the pressure of embarrassed circumstances; that the release which he executed, upon receiving that account, was obtained from him for fraudulent purposes; that it had been tendered to him ready prepared for his execution; and that no time had been allowed to him to consider its effects, or to take advice upon its propriety; that a fair sale had not been made of many parts of the testator's property, both real and personal, but that the defendant *Edmonds* had retained the same at prices far below their real value.

The bill contained an allegation that the plaintiffs had paid Messrs. *Williams & Co.*, and Messrs. *Gramolt*, the amount of their respective debts, with interest; and that they had "paid large sums of money in payment of the debt of 1600*l.* due to the said *Herbert George Jones*, and the other debts specified in the indenture of *September*, 1834."

The bill prayed that the plaintiffs might have the benefit of the indenture of *September*, 1834, and of the several securities given to Messrs. *Williams & Co.*, and Messrs. *Gramolt*. That the alleged settled account and release might be declared fraudulent and void, as against the plaintiffs, as claiming under *Robert Todd*; and that the release might be delivered up to be cancelled. That notwithstanding any transactions between *Robert Todd* and the defendant *Edmonds*, an account might be taken

1835.

PROSSER
v.
EDMONDS.

1835.

PROSSER
v.
EDMONDS.

of the testator's real and personal estate, not specifically devised or bequeathed; that the estates remaining unsold, or alleged to have been unsold by *Edmonds*, might be forthwith sold under the direction of the Court; and that the proportion of the plaintiffs, in the clear residuary estate of the testator, might be ascertained and secured for their benefit &c.

To this bill the defendants, the executors, demurred, on three grounds: first, for general want of equity; secondly, that the creditors of *Robert Todd*, who were scheduled to the indenture of the 4th *September*, 1834, were not made parties to the bill; thirdly, because *William Todd* was not made a party to the bill.

Mr. *Simpkinson*, and Mr. *Koe*, for the demurrer.—The defendants, though they pleaded to the original bill, are entitled to demur to the amended bill: *Robertson v. Lord Londonderry* (a). Even after answer, a plea to an amended bill is admissible: *Ritchie v. Aylwin* (b), *Gambier v. Le Hoope* (c).

Then there are three grounds on which this demurrer will lie:—first, this is a purchase by the plaintiffs of a law-suit. It is the purchase of an interest which has been released, and which can only be made available by a suit in equity. It is not the purchase of a chose in action, or of a vested interest, but of a right to set aside settlements of accounts and releases. It is, therefore, maintenance in the strictest sense of the word. Such a transaction cannot be supported in equity, any more than at law: *Stevens v. Bagwell* (d). [The Lord Chief Baron.—There was some portion of *Robert Todd's* interest which had not been assigned to *Edmonds*.] That was merely the reversion in the consols, after setting apart sufficient to secure

(a) 5 Sim. 226.

(b) 15 Ves. 79.

(c) 1 Dick. 42.

(d) 15 Ves. 139.

the annuities. No relief is sought as to that, because the annuities are still subsisting. Besides, the plaintiffs derive their whole title, under the deeds of *September, 1834*, which cannot give them a right to institute a suit to set aside these transactions. *Robert Todd* gives them no authority to do so. The suit is, to a certain extent, for his benefit; and yet he makes no complaint of fraud, and there is an express allegation that he refuses to join in the suit.

Secondly, the scheduled creditors are not parties to the suit. If the deed of *September, 1834*, had contained specific trusts for the benefit of the creditors, it is clear that they would have been necessary parties. It is true that, by the terms of this deed, they are not immediately to be paid out of the proceeds, yet, substantially, they are to be so paid. The plaintiffs are to be reimbursed out of the sales. Suppose they had received the money, and had refused to pay the scheduled creditors, could not those creditors have filed a bill against them to enforce payment? It may possibly be answered, on the authority of *Garrard v. Lord Lauderdale* (a), that, inasmuch as they have not executed the deed, they could not file such a bill. That, however, does not apply to *Herbert George Jones*. He executed the deed, and they do not allege that they have paid him. He, therefore, remains a creditor, and ought to have been a party to this suit.

Thirdly, *William Todd* should have been made a party to this suit. He had a right of pre-emption of certain estates specified in the testator's will. Some of those estates have been sold, and the plaintiffs seek to set aside the sale. If the sale were set aside, the parties would be restored to their original situation, and *William* would have the benefit of that result as well as *Robert*. It might be otherwise, if he had assigned his right to *Robert* in

1835.
PROSSER
v.
EDMONDS.

(a) 3 Sim. 1.

1835.

PROSSER
v.
EDMONDS.

of the testator's real and personal estate, not specifically devised or bequeathed; that the estates remaining unsold, or alleged to have been unsold by *Edmonds*, might be forthwith sold under the direction of the Court; and that the proportion of the plaintiffs, in the clear residuary estate of the testator, might be ascertained and secured for their benefit &c.

To this bill the defendants, the executors, demurred on three grounds: first, for general want of equity; secondly, that the creditors of *Robert Todd*, who were parties to the indenture of the 4th *September*, 1834, were not parties to the bill; thirdly, because *William Todd* was not made a party to the bill.

Mr. Simpkinson, and *Mr. Koe*, for the defendants, though they pleaded to the bill, were not entitled to demur to the amended bill. *Londonderry (a)*. Even after answer the bill is admissible: *Ritchie v. Ritchie (b)*. *Hoope (c)*.

Then there are three grounds on which the bill will lie:—first, this is a proper bill. It is the purchase money of the estate, released, and which is due to the plaintiffs in equity. It is not a bill for the recovery of a vested interest, or of accounts and profits, or for the enforcement of a trust in the strictest sense. It cannot be set aside.

Stevens v. B. (d)

was some property

been assigned

in the bill.

See also (e)

See also (f)

1835.

PROSSER
v.
EDMONDS.

arose out of an express
that the scheduled cre-
the deed, should be parties
proposition that a deed
the benefit of creditors, no
taking any benefit from it,
which the grantor might
no creditor can avail him-
Garrard v. Lord Lauderdale
the law to be otherwise, this
creditors. It does not recite
desirous of paying his debts, but
agreed to do so. If the plaintiffs
what remedy have the latter
the deed? It is a trust simply for the
themselves, namely, that they may
after payment of the creditors.
contained a specific trust for the cre-
not be necessary parties to a bill
trustees, to carry those trusts into exe-

that *William Todd* is a necessary party
able, because the bill alleges, and the de-
that all the right and interest of *William* is
plea to the original bill was an admission by
ants, that, but for the plea, the plaintiffs had a
them. The plea, therefore, having been sub-
and the bill amended, the plaintiffs have a *locus*
in curia, and the defendants cannot demur to the
led bill. Besides, the release could only bar the in-
y as to one portion of the testator's estate to which

1835.

PROSSER
&
EDMONDS.

clear terms, but he has assigned only his interest in the residuary personal estate. At all events he did not assign till after the delivery of the account; and he would be entitled to any benefit arising from the account being set aside.

Mr. *S. Girdlestone*, and Mr. *Bethell*, for the bill.—This is a bill by the assignee of a *cestui que trust* against his trustee to open transactions by which the trustee has obtained the whole property. Any one fraudulent fact stated in the bill, or any one improper item in the account, is sufficient for that purpose. Here there is no account, properly so called, of the sale of the real estates. What is stated on that subject is comprised in a single item. [The *Lord Chief Baron*.—You say the *Todds* got an insufficient account, but they do not say so. It is scarcely necessary to labour that point.] The release in 1829 was given under circumstances of fraud, and the plaintiffs have a right to avail themselves of it. It is a mistake to say they derive their whole title from the deeds of *September, 1834*. They acquired by assignment all the interest which Messrs. *Williams & Co.* and *Gramolt* had in the estate of *Robert Todd*, and that amounted to the whole of his possible interest in his father's property. Here, therefore, were *bonâ fide* mortgages transferred to the plaintiffs; and they were sufficient, without regard to the former deed, to give them a right to set aside these transactions. The objection on the ground of maintenance will not prevail. There is a portion of the property unaffected by any assignment to *Edmonds*, and which has become vested in the plaintiffs, through the *Gramolts*; namely, *Robert Todd's* reversionary interest in the 11,000*l.* consols. That circumstance alone is sufficient to sustain the bill, which extends to all the property of *Robert Todd*. *Stevens v. Bagwell* (a) is distinguishable from the present case; for there

(a) 15 Ves. 139.

what was held to be maintenance arose out of an express agreement between the parties.

Secondly, it was not necessary that the scheduled creditors, who were not parties to the deed, should be parties to this bill. It is an indisputable proposition that a deed of assignment to trustees, for the benefit of creditors, no creditor being a party to it, or taking any benefit from it, is a mere voluntary instrument, which the grantor might himself defeat, and of which no creditor can avail himself in a Court of equity: *Garrard v. Lord Lauderdale* (a). But, supposing the law to be otherwise, this is not a deed in trust for creditors. It does not recite that *Thomas Todd* was desirous of paying his debts, but that the plaintiffs had agreed to do so. If the plaintiffs omit to pay the creditors, what remedy have the latter against them under this deed? It is a trust simply for the benefit of the plaintiffs themselves, namely, that they may reimburse themselves after payment of the creditors. Even if the deed contained a specific trust for the creditors, they would not be necessary parties to a bill brought by the trustees, to carry those trusts into execution.

The objection that *William Todd* is a necessary party is quite untenable, because the bill alleges, and the demurrer admits, that all the right and interest of *William* is vested in *Robert*.

Lastly, the plea to the original bill was an admission by the defendants, that, but for the plea, the plaintiffs had a right to sue them. The plea, therefore, having been submitted to, and the bill amended, the plaintiffs have a *locus standi in curiâ*, and the defendants cannot demur to the amended bill. Besides, the release could only bar the inquiry as to one portion of the testator's estate to which

1835.

PROSSER
&
EDMONDS.

(a) 3 Sim. 1.

1835.

PROSEK
v.
EDMONDS.

is, that such a claim could not be sustained in equity, unless the party who made the assignment joined in the prayer to set it aside. In such a case a second assignment is merely that of a right to file a bill in equity for a fraud; and I should say that some authority is necessary to shew that a man can assign to another a right to file a bill for a fraud committed upon himself. I own, however, that in the present case there is considerable difficulty arising from the reversionary interest which *Robert Todd* had to assign; and the question is, whether the bill is so framed as to entitle the plaintiffs to any equity on that subject.

With respect to the other points which have been raised, I think that *William Todd*, having assigned his interest to his brother, is not a necessary party to this suit. As to *Jones*, who was a party to the deed of assignment, there is some doubt.

Upon the whole, if I were called upon to decide this case now, I should decide against the demurrer on the narrow ground that there was, at the time of the assignment to the plaintiffs, a subsisting interest in *Robert Todd*, which did not pass to *Edmonds*. But the case deserves further consideration.

Dec. 17th.

The LORD CHIEF BARON.—The testator, after bequeathing certain annuities to various persons, directed that his real and personal estate should be sold by his executors, *Edmonds* and *Hughes*, and divided into three parts. His daughter, the wife of *Edmonds*, was to have one part; and, from the remaining two parts, she was to take 10,000*l.*, and the residue was to be divided between his two sons, *Robert* and *William Todd*; and he states, as his reason for giving his daughter a larger portion, that he had made advances to his two sons in his lifetime. He then specifies certain real estates, of which he gives the

right of pre-emption to *William Todd*, and other estates, of which he gives the right of pre-emption to *Robert Todd*; and then he gives his daughter a right of pre-emption of any part of the residue; so that, with the exception of the two parts specifically appropriated to *William* and *Robert Todd*, if they chose to purchase them, his daughter had a right, if she chose, to purchase the whole.

The testator soon afterwards died. The two executors proceeded to administer his personal estate, and made sale of the real estate; and *Edmonds*, in right of his wife, purchased part of the real estate: though what part in particular was purchased by him is not specified; nor does it appear by the bill that he was the purchaser of any part of that of which the sons had a right of pre-emption. There was then a settlement of accounts, and there is a particular account annexed to the bill, and referred to; and, upon an inspection of that account, and from the circumstances stated in the bill, it appears that *Edmonds* had made payments from time to time to *Robert* and *William Todd*. These matters were then adjusted, and the balance due to the brothers was paid to them; and, up to that time, they acknowledged that the accounts were fully settled. Afterwards, both brothers executed releases to *Edmonds* and *Hughes*, the executors.

There are many conveyances and deeds set forth in the bill, but it is not necessary to particularize all of them, because those on which the question turns are few. The executors set apart a considerable sum of stock to answer the annuities bequeathed by the will, and the bill makes no complaint of that appropriation. They did no more than would be decreed to be done by this Court, or any Court of equity having the disposal of the testator's estate. By the release of 1829, *Robert Todd* purchased all the interest of his brother, *William Todd*; and, by other instruments, executed in 1830, his interest stood thus: that, with the exception of the reversionary interest

1835.

PROSSER
v.
EDMONDS.

1835.

PROSSER

v.

EDMONDS.

which *Robert Todd* had in those sums which had been invested in the funds for payment of the annuities, he had, in consideration of a certain sum, and further sums which *Edmonds* had lent him, assigned to *Edmonds* the whole of his interest in his father's residuary estate, and also the whole interest of *William Todd*, which he had purchased. The whole of the accounts, therefore, had been settled, and the whole of the interest of *Robert* and *William Todd* vested in *Edmonds* in 1830. Matters remained so until the year 1833. By an instrument executed in that year, *Robert Todd*, having borrowed a sum of money of Messrs. *Williams*, the bankers, for securing to them the repayment of that sum, assigned to them the reversionary interest in the one-third part of the annuity fund, to which he had a right. By another deed, executed soon afterwards, it appears that, conceiving he had still an interest in other parts of the property, he assigned to *Williams & Co.* all his interest in his father's residuary personal estate, upon trust, that what money they should receive should be held for his benefit. The next deed of importance is executed in 1834, to which those bankers and *Robert Todd* were parties, and also the executors. By this deed *Williams & Co.*, at the request of *Robert Todd*, released to *Edmonds* and *Hughes* that claim in the residuary interest which he had assigned to them; so that it appears that, for the second and last time, in May, 1834, the whole interest of *Robert* and *William Todd* was vested in the defendant *Edmonds*.

The bill states misconduct in the executors in administering the testator's estate. It charges imposition and misrepresentation as made to *Todd*, to induce him to sign the release, and settle that account. It makes a case, which might be a case for *Robert Todd* to file a bill to call on the executors to acquit themselves by answer of the representations of fraud and concealment practised upon him. But still he had nothing but a naked right to file a

bill in equity—no legal right—no equitable interest, except a reversionary interest in those sums of money, out of which the annuitants were paid. If he had a right to file a bill at all, it was a naked right not clothed with any possession.

Under these circumstances, the plaintiffs come upon the stage. In *September*, 1834, a deed was executed by *Robert Todd* to the plaintiffs. (His Lordship then stated the deed.) The plaintiffs, under colour of this conveyance, have filed the present bill, in which they call on the executors to answer for their proceedings in the administration of the testator's estate—by which they seek of the Court to set aside the deeds of conveyance from *Todd* to *Edmonds*—to annul the purchase by *Edmonds* of any portion of the real property of the testator—and generally for an account; and they ground themselves on representations stated to have been falsely made to *Robert Todd*, to induce him to enter into these arrangements. All that is material to the question is raised by the bill, to which *Robert Todd* is made a defendant, who had no complaint to make, and who refused to be a plaintiff.

The defendants, *Edmonds* and *Hughes*, have demurred to the bill on three grounds. One ground of demurrer is, that the scheduled creditors of *Robert Todd* are not parties; and another is, that *William Todd* is not a party. I do not find any case from which it appears that the mere circumstance of a creditor being interested in the administration of an estate, makes it necessary that he should be a party to a bill like the present. The mere engagement by a person to pay the creditors, if he gets in the fund, will not make them parties to any contract for their payment; though, no doubt, where the creditors are parties to and interested in a contract of that nature, they must be made parties to a bill for carrying that contract into effect. Therefore, the demurrer would be well if confined to the fact that *Jones* is not a party; for he

1835.

PROSSER
v.
EDMONDS.

1835.

PROSEK
v.
EDMONDS.

was a party to the deed, and entered into an engagement under seal with the plaintiffs, by which it is plain that they are bound. The other creditors are named in the schedule, but there was no contract by which they are parties.

The omission to make *William Todd* a party is not a ground for allowing the demurrer. He parted with his whole interest to *Robert Todd*, and there is no imputation of fraud as between those two persons, and no suggestion that *William Todd* had any ulterior interest whatever. It is not the object of the bill to bring before the Court any question as to the money in the funds; and, therefore, any interest which *William Todd* has in that is undisturbed. He has no interest in any question here. He is, therefore, not a necessary party.

The remaining cause of demurrer, namely, that the plaintiffs have no right to equitable relief, raises an important and curious question, which is this—whether or not parties who either become purchasers for a valuable consideration, or who take an assignment in trust of a mere naked right to file a bill in equity, shall be entitled to become plaintiffs in equity in respect of the title so acquired. Now, in the course of the argument, it was urged that an equitable as well as a legal interest may be the subject of conveyance, and that the assignee of a chose in action may file a bill in equity to recover it, though he cannot proceed at law for that purpose. But where an equitable interest is assigned, it appears to me, that in order to give the assignee a *locus standi* in a Court of equity, the party assigning that right must have some substantial possession, some capability of personal enjoyment, and not a mere naked right to overset a legal instrument. For instance, that a mortgagor who conveys his estate in fee to a mortgagee, has in himself an equitable right to compel a reconveyance, when the mortgage-money is paid, is true. But that is a right reserved

to himself by the original security; it is a right coupled with possession and receipt of rent; and he is protected so long as the interest is paid; and it does not follow that the assignee of the mortgage and the mortgagee may not adjust their rights without the intervention of a Court of equity. In the present case, it is impossible that the assignee can obtain any benefit from his security, except through the medium of the Court. He purchases nothing but a hostile right to bring parties into a Court of equity, as defendants to a bill filed for the purpose of obtaining the fruits of his purchase.

So, where a person takes an assignment of a bond, he has the possession; and, though a Court of equity will permit him to file a bill on the bond, it does not follow that he is obliged to go into a Court of equity to enforce payment of it. So, other cases might be stated to shew, that where equity recognises the assignment of an equitable interest, it is such an interest as is recognised also by third persons, and not merely by the party insisting on them.

What is this but the purchase of a mere right to recover? It is a rule—not of our law alone, but of that of all countries (*a*), that the mere right of purchase shall not give a man a right to legal remedies. The contrary doctrine is nowhere tolerated, and is against good policy. All our cases of maintenance and champerty are founded on the principle that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce. There are many cases where the acts charged may not amount precisely to maintenance or champerty, yet of which upon general principles, and by analogy to such acts, a Court of equity will discourage the practice. Mr. *Girdlestone* was so obliging as to furnish me with a case, that of *Wood v. Downes* (*b*), in which it appears to me that

1835.

PROSSER
v.
EDMONDS.

(*a*) See Voet. Comm. ad Pandect. Lib. 41, tit. 1, sect. 38.

(*b*) 18 Ves. 120.

1835.
 PROSSER
 v.
 EXMERDA.

the principle laid down by Lord *Eldon* goes the full length of supporting the judgment of allowing this demurrer. That was a bill filed to set aside certain conveyances, which it was alleged were obtained by the defendant, in consequence of his situation of solicitor to the plaintiffs, the estate comprised in the conveyance not being in their possession at the time, but subject to litigation. Lord *Eldon*, in decreeing relief, adopted not only the ground that the party was the solicitor of the plaintiffs, but that the transaction was contrary to good policy. He said—“The objection, therefore, is not merely that which flows out of the relation of attorney and client, but upon the fact that this was the purchase of a title in litigation, with reference to the law of maintenance and champerty;” and he accordingly decreed the conveyance to be set aside, on the ground of litigated title.

Here the proceeding is the converse of that in *Wood v. Downes*. It is not to set aside the conveyance in question, but to establish it. The principle is the same in both cases; for if, under the present circumstances, *Robert Todd* had filed his bill against the plaintiffs, I should have declared it to be a void deed, and should have ordered it to be set aside. Upon the same facts, therefore, I ought to refuse to establish the deed in their favour.

But the case does not rest here. There is a short but useful statute, which it is proper to refer to, that of the 32 of *Hen. 8*, c. 9, which is a legislative rule on the subject, and consistent with general policy and the principles of Courts of law and equity. Under that statute, if the person who parts with his title has not been in actual possession of the land within a year before the sale, he, as well as the buyer, is liable to the penal consequences of the act. I do not say that that is precisely the case here, because the conveyance purports to contain an ulterior trust for the party assigning, and, therefore, an action

could not be brought against him on the statute. At the same time, it is to be observed, that, from many cases in *Anderson* and *Coke*, it appears that Courts of common law were favourable to actions on the statute, considering them to be highly beneficial, and not without good cause to be restrained.

It has been the opinion of some learned persons, that the old rule of law that a chose in action is not assignable, was founded on the principle of the law not permitting a sale of a right to litigate. That opinion is to be met with in Sir *William Blackstone* and the earlier reporters. Courts of equity, it is true, have relaxed that rule, but only in the cases which I have mentioned, where something more than a mere right to litigate has been assigned. Where a valuable consideration has passed, and the party is put in possession of that which he might acquire without litigation, there Courts of equity will allow the assignee to stand in the right of assignor. This is not that case. *Robert Todd*, when he assigned, was in possession of nothing but a mere naked right. He could obtain nothing without filing a bill. No case can be found which decides that such a right can be the subject of assignment, either at law or in equity.

The case itself is a strong illustration of the doctrine, that to encourage such transactions as the present is contrary to good policy. I do not know who the plaintiffs are; possibly they are attornies. Suppose, then, that this party having an interest under this will, and having settled all his rights, assigns all his interest for a valuable consideration; if he be at liberty afterwards, by another assignment, to create a new trustee for himself, and can give the trustee a right to bring the matter into litigation, if that trustee is an attorney, and the Court of equity entertains the suit, what is the result? That all the funds must be brought into Court; and, as he stands in the situation of trustee, all the expense of litigation must be paid out of the fund;

1835.

PROSNER
v.
EDMONDS.

[REDACTED]

[REDACTED]


[REDACTED]

[REDACTED] the plaintiff and Henry Butterworth, as
[REDACTED] 1857-58 bales of printed cottons

[REDACTED] the underwriters, and an offer was made by the in-
[REDACTED] declined the offer of abandonment; and, after some nego-
[REDACTED] was offered by the underwriters of 35% per cent. on the sum in-
[REDACTED] was cancelled. This per-centage was accordingly paid,
[REDACTED] years afterwards, in pursuance of a convention between Great
[REDACTED] government the goods were ordered by the latter government to be
[REDACTED] and compensation made. A claim was made by the underwriters in the
[REDACTED] for compensation, but held, that the underwriters having de-
[REDACTED] the offer of abandonment, the payment of the 35% per cent. was a compromise in their in-
[REDACTED] policy, and that they were not entitled to any portion of the sum advanced for
[REDACTED]

on board a ship called the *Atlantic*, bound from *Liverpool* to *Buenos Ayres*, the invoice value of which goods was 1915*l.* 10*s.*

1835.
BROOKS
v.
MACDONNELL.

On the 13th of *May*, 1826, the plaintiff and his late partner effected an insurance with the defendant *John MacDonnell*, as the agent for and on behalf of the *Patriotic Assurance Company of Ireland*, on the thirty-six bales of cotton; and *John MacDonnell*, as such agent, signed a policy of insurance, dated the 13th of *May*, 1826, by which the goods, therein described as thirty-six bales of printed cotton, marked , were insured by the company from *Liverpool* to *Buenos Ayres* for 1440*l.*, each bale being for that purpose valued at 40*l.*, to pay average on each package separately; and a premium of 3*l.* per cent. on the sum insured was paid to *MacDonnell* as the agent of the company.

On the 1st of *May*, 1826, the *Atlantic* sailed from *Liverpool* on her voyage to *Buenos Ayres*, and in the course of such voyage, and for an alleged attempted breach of a blockade which the *Brazilian* government had declared against the port of *Buenos Ayres*, was captured by the forces of the *Brazilian* government, and taken into the port of *Rio de Janeiro*, where the ship, and all the cargo on board, including the thirty-six bales of cotton belonging to the plaintiff and his partner, were condemned. Many other ships of this country, and their cargoes, were about the same time seized and condemned in like manner.

Shortly after the intelligence of the capture of the *Atlantic* and her cargo was received in *England*, the plaintiff and his partner applied to *MacDonnell*, as the agent of the *Patriotic Assurance Company*, for payment of the 1440*l.* as for a total loss, and at the same time offered to abandon their interest in the goods. In answer to such application, the defendant, *MacDonnell*, wrote to the agents of the plaintiff and his partner a letter

1835.
BROOKS
v.
MACDONNELL.

Third, all sums of money paid for port charges and anchorage. Fourth, the full amount of freight and passage money, payable at the port of discharge, but which, in consequence of the detention, has not been paid. Fifth, losses arising to the vessels for non-fulfilment of charter-parties. Sixth, demurrage from the date of the detention of the respective vessels, until the date of the execution of the respective sentences; the rate of such demurrage to be regulated according to the rates generally paid on *English* vessels. Seventh, all law charges or commissions in lieu of the same, in defending the vessels and cargoes, adjusting general averages, &c.; and also the same commissions for recovering the same to the parties. Eighth, the wages and maintenance of the masters and crews remaining in *Brasil* for the defence and protection of the vessels and cargoes, from the date of their capture to the date of the execution of the sentences or sale of the vessels, with the passage of the masters to *England*. Ninth, the indemnities for the cargoes generally shall be regulated by the invoices, bills of lading, manifesto, and other documents, which may be presented to the commissioners duly attested by the parties or their agents. Tenth, the indemnities for the cargoes condemned, to be regulated according to the invoice cost, and all charges, with 10 *per cent.* on such amount for loss of market. Eleventh, such part of the cargoes restored as have been embezzled, lost, damaged, perished, deficient, to be paid for upon the same principles as expressed in the last article. Twelfth, those parts of the cargoes restored, and which have been sold in *Rio de Janeiro*, to be valued at the invoice amount, and charges, with 10 *per cent.* as above, from which to be deducted the net proceeds of the sales, the difference to be admitted as the loss to be indemnified. Thirteenth, those parts of the cargoes to be restored, and which have been exported, to be indemnified according to the invoice value by such

per centage on the same as to the commissioners may appear to be fair and reasonable, under all the circumstances of each respective invoice; taking into consideration the state of the market of *Rio de Janeiro*, the description of the merchandize, and the place to which it has been shipped, together with the amount of general average paid, and all charges on shipment. Fourteenth, the owners of the respective cargoes to be indemnified for all extra charges of warehouse rent, and duties paid, arising from detention. Fifteenth, such cargoes as were shipped for discharge at port or ports on the West coast of *South America*, the value of the same at such port of discharge to be taken, as far as is practicable, as the basis for estimating the indemnity. Sixteenth, such cargoes as were carried into *Monte Video*, and offers there made to the captors to give ample security for their value, but which offers were refused, the values to be estimated at the current market price at *Monte Video*, as the basis for indemnities. Seventeenth, the amount of indemnities being adjusted in *Brasilian* money, the same shall bear interest as respects the vessels, at the rate of 6*l. per cent. per annum*, from six months after the date of the capture, till payment is made. Eighteenth, interest on the values of the cargoes restored by the decree of the 21st of *May*, 1828, or by sentences of the tribunal, to be paid at the rate of 1*l. per annum* from the date of the capture, till the execution of the final sentence. Nineteenth, in adjusting the indemnities, the commissioners shall reduce the account from sterling money into *Brasilian* currency, at the rate of thirty-two pence per milrea. Twentieth, the sums which are to be liquidated shall be realized in equal payments made at this Court, the first being paid at twelve, the second at twenty-four, and the third at thirty-six months, reckoned from the day of the date on which the liquidation of each prize is settled. For this object policies shall be issued by the public treasury, in which the

1835.

BROOKS

v.

MACDONNELL.

1835.

BROOKS
v.
MACDONNELL.

name or names of the parties interested shall be inserted in favour of whom they shall be drawn; and these shall be placed at the disposal of his Britannic Majesty's legation at this Court, in order that they may be delivered to those to whom they really appertain.

"Rio de Janeiro, 5th May, 1829."

Commissioners were duly appointed, pursuant to the said memorandum, and, on the 27th *August*, 1829, *George Maylor* and *George Marsh*, the two commissioners appointed on behalf of the *British* government, sent a letter to *Thomas Marsh*, Esq., the chairman of the *Braxilian* committee in *London*, to the effect following:—

"Rio de Janeiro, 27th August, 1829."

"Sir,—Having been appointed by his *Britannic Majesty's* minister at this Court, and approved of by the *Braxilian* government, as commissioners for the settlement of the indemnities for *British* properties seized during the blockade of the river *Plata* by the *Brazilian* squadron, we have the honour to transmit to you a memorandum of the form of the oath required to be made to the invoices, and of the documents that will be wanted; having further to advise that, in cases where the owners of goods have been their own underwriters, they will not be allowed to charge the premium in their invoices, and that where part of an invoice has been insured, and the owner of the goods has run the risk on the remainder, it would be well that a declaration on oath to that effect should accompany the certified policy of insurance, as the latter is demanded chiefly for the purpose of checking the amount of the invoices. We will thank you to cause our present communication to be made as public as possible amongst those concerned in the *Brazilian* trade, that they may forward their claims in proper form and without delay."

And the letter pointed out the necessary form of oath and the documents to be produced to substantiate the claims of the claimants.

1835.
BROOKS
v.
MACDONNELL.

In pursuance of the memorandum and letters, the plaintiff and his partner forwarded their claims, which were duly made, to the commissioners at *Rio de Janeiro*, who, on the 17th day of *May*, 1833, awarded them the release of their goods detained as aforesaid, and also a sum of 1488*l.* 8*s.* 4*d.* for compensation for the aforesaid losses. During the time the plaintiff and his partner were substantiating their claims before the commissioners, the *Patriotic Assurance Company* sent out a claim to the *Brazilian* government for a proportion of the indemnity claimed by the plaintiff and his partner; but neither the *Brazilian* government nor the commissioners decided as between the plaintiff and his partner on the one hand, and the insurance company on the other, but left the question as between them to be determined in this country; and thereupon it was agreed between the plaintiff and his partner on the one side, and the company on the other, that the sum of 1488*l.* 8*s.* 4*d.* for the loss should be transmitted by the commissioners to the defendants, Messrs. *Percival & Co.*, the bankers, to be received and retained by them for the benefit of the persons entitled thereto; and the same was accordingly, in or about the month of *January*, 1834, transmitted to them, with a direction to hold the money in the joint names of Mr. *Charles Moss*, as agent for Messrs. *Butterworth & Brooks*, of *Manchester*, and Mr. *MacDonnell*, as representing the *Patriotic Insurance Company*, until the parties agreed as to the appropriation of it.

The bill was filed by *William Brooks*, as the surviving partner of *Henry Butterworth*, against *MacDonnell* as the agent of the *Patriotic Insurance Company*; *William Robinson*, the secretary of the company; and against

1835.

Brooks
v.
MacDonnell.

Messrs. *Percival & Co.*, the bankers, to whom the compensation had been remitted by the *Brazilian* commissioners, on account of the parties entitled.

The bill, after stating the facts, charged that *MacDonnell* and *Robinson*, as the agent and secretary of the *Patriotic Assurance Company*, respectively claimed some interest in the money awarded, and insisted that they were entitled to have either the whole or a part thereof paid to them. The bill prayed a declaration to whom the 1488*l.* 8*s.* 4*d.* belonged, and that the defendants, the bankers, might be decreed to pay it to the plaintiff, and be restrained from paying it to the defendant *MacDonnell*, or any other person.

The answers did not dispute the accuracy of the general statements contained in the bill. The defendant *MacDonnell*, however, submitted that he was the mere agent of the company in this country, and had no interest in the matter in question, except as such agent, and that he ought not to have been made a party to the suit. The defendant *Robinson*, as the secretary to the company, submitted, on behalf of the company, that, if not entitled to the whole of the 1488*l.* 3*s.* 4*d.*, the company was at least entitled to be repaid the 504*l.*, the amount of the 35*l.* *per cent.*, paid by the company according to the arrangement with the plaintiff and his partner.

The money was paid into Court by the defendants, the bankers, pursuant to an order for that purpose, and was invested in Bank Annuities.

The cause now came on for hearing on admissions.

Mr. *Simpkinson*, and Mr. *Stinton*, for the plaintiff.—The clear effect of the arrangement of 21st *July*, 1828, was this: the assured agreed to accept 35*l.* *per cent.* in lieu of all claims, and agreed to release the company. The company were released from all liability in respect of the goods, on payment of this money. $\frac{3}{4}$ They could have no

interest in the goods; and, on the other hand, the plaintiff and his partner could have no further claim on the company.

It is quite immaterial whether the plaintiff had a right to abandon or not, because the offer to abandon was rejected by the company. The dealing between the parties was totally different to the case of an abandonment. The nature of the contract between the parties was, that the company, in consideration of a sum of money, agreed to indemnify the plaintiff and his partner against all loss. If the loss were a total loss, then the company was to pay according to the value, *cent. per cent.* The liability, to a certain extent, was incurred when the offer of abandonment was made. The effect of the contract was the same as if the company had said, if you will release us from the contract, we will pay you so much. If the goods had not been restored by the *Brasilian* government, the plaintiff would not have had any further demand against the company, though the loss would be at least two-thirds. So, again, supposing the goods had been returned to the plaintiff in specie, the company would not have had any lien on them. The plaintiff and his partner would have been at liberty to have sold the goods, and the company would not have had any lien on any portion of them. The transaction amounted merely to a rescinding of the contract of indemnity entered into by the company. The contract was put an end to by the cancelling of the policy, and the case must be treated in the same manner as if no insurance had ever been effected. The company do not pretend to say that they ever had any claim on the goods.

In *Tunno v. Edwards* (a), where goods insured upon a valued policy had been seized and confiscated, but the necessary documents to verify the loss had not been re-

(a) 12 East, 483.

1835.

BROOKS
 v.
 MACDONNELL.

ceived, and the underwriters agreed to adjust and pay immediately 50*l. per cent.* on account, but no abandonment was made by the assured, and subsequently half the proceeds of the goods were restored, which half amounted to more than the sum at which the whole goods were valued in the policy; it was held that the underwriters were not entitled to recover back the 50*l. per cent.* paid on account, the assured having, in fact, sustained a loss of half the goods, for which he was no more than indemnified by the 50*l. per cent.*, there having been no abandonment, and the increased value of the other half of the proceeds arising from the turn of the market, in which the underwriters had no concern. The present case is governed in principle by *Blaamopot v. Da Costa* (a), in which satisfaction having been made under a commission for distribution of prizes to the insured, such of the insurers as had paid were held entitled to restitution, but not those who had compounded and renounced salvage. The arrangement in this case amounted to a compounding of the liability of the *Patriotic Assurance Company*, and to a renunciation of any right to salvage.

The defendant, *MacDonnell*, by his answer, objects that he is erroneously made a party to the suit, being a mere agent, and insists that the bill ought to be dismissed against him. It is true that he is a mere agent, but he is the agent of a *quasi* foreign company, and has mixed himself up with the whole of the transaction, and made a claim on the part of the company, and the fund was subjected to the order and disposal of *MacDonnell*.

Mr. *Maule*, and Mr. *Griffith Richards*, for the defendants *MacDonnell* and *Robinson*.—The total proceeds are 2552*l.*, on an advance admitted originally to be of the value of 1440*l.* [The *Lord Chief Baron*.—The question of value cannot influence my decision.] It will appear by the

(a) 1 Eden, 130.

policy that it was a valued policy. There is no statement as to the price actually paid ; nothing more than that the price is the invoice price. [The *Lord Chief Baron*.—Suppose in this case the claim had failed, and the commissioners had not awarded anything, and the goods had been lost, would your client have been liable to pay any thing more?] We are in the situation of persons who have paid as for a total loss. [The *Lord Chief Baron*.—In cases of total loss, the insurers are entitled to the salvage, paying the charges and expenses, but not in the case of partial losses.] There are exceptions to this. Suppose the case of a partial loss to goods occasioned by collision, the underwriters are liable for a partial loss: and suppose, after they have paid such loss, the insured bring an action against the owners of the ship which occasioned the injury, and recover damages, would not the insured be trustees of the damages recovered for the underwriters? [The *Lord Chief Baron*.—I think they would. Actions are very often brought by underwriters in the name of the insured.] This proceeds on the principle that a contract of insurance is a mere contract of indemnity; and if the insured is indemnified for the same injury by two parties, he can only get one indemnity, and is a trustee for the underwriters of the surplus. The only question on the taking of the goods was, whether it was or was not a total loss. There was no question whether it was a total or a partial loss. The only question was, whether it was a total loss for which the underwriters were liable. The underwriters would probably have been held discharged from their liability in consequence of the ship breaking the blockade, of which the sentence of a foreign Court is sufficient evidence. The sentence, in the present case, shews satisfactorily an intention, at least, to break the blockade. The claim was, therefore, of a doubtful nature; and, in consequence of such doubt, the arrangement took place. There is no pretence

1835.

Brooks
v.
MacDonnell.

1835.
 Brooks
 v.
 MacDONNELL.

for saying that it was not a total loss if it were a loss at all. The arrangement amounted to nothing more than an agreement to put an end to the policy. When a total loss occurs, and is satisfied by payment, the policy is always delivered up to be cancelled; but that does not interfere with the right of the underwriter to say to the insured, you are a trustee for me of the surplus received *aliunde*. There may, perhaps, be an election in the insured from which quarter he will receive the compensation. The right of the insurer does not arise out of the policy, but on those principles of fairness and equity which enable the underwriter to recover as for money had and received, and which are similar to trusts in equity. [The *Lord Chief Baron*.—If the loss were treated as a total loss, the cancelling of the policy could not in any manner affect the question.] Admitting that the underwriter may sell or relinquish his right to compensation or salvage on a total loss, still such an agreement is not to be implied. In *Blaauwpot v. Da Costa*, it was laid down by Lord Northington, that the compensation in that case was to be considered as a retribution to the underwriters as lessening the loss occasioned by the capture. The same principle was acted upon in *Randal v. Cockran* (a), before Lord Hardwicke, in which it was decided that the insurer, after satisfaction, stands in the place of the assured as to the goods, salvage, and restitution, in proportion to what he paid. In *Tunno v. Edwards*, the compensation was only in respect of half, not for a total loss; and whether the insured took the other moiety of the goods to a good or a bad market, was quite immaterial to the underwriters; the compensation was in respect of one moiety only, and the insured had a right to ascribe it to either moiety. Suppose, in that case, the underwriters had paid *cent. per cent.* as on one total loss, what answer could have been given to the underwriters' claim? In that case, the *Dutch* government

(a) 1 Ves. 98.

gave compensation for half the loss, not for the whole. In the present case, the *Brasilian* government indemnified the parties for the whole. Suppose that in *Tunno v. Edwards* the *Dutch* government had paid the whole instead of a moiety, could it have been contended that the assured would not have been a trustee of a moiety, or that the underwriters would not have been entitled to have 50*l. per cent.* returned? Possibly, a distinction may be taken between the case of an accepted and a rejected abandonment. In *Tunno v. Edwards*, Lord *Ellenborough* says, that in order to have made it a total loss, there ought to have been an abandonment, which there had not been, and therefore that there was no ground for the underwriters' claim. What is meant by this is clearly an abandonment, and an acceptance of the abandonment. If there had been such an abandonment and acceptance, in that case the underwriters would have had to pay, not 50*l. per cent.* only, but 100*l. per cent.* In that case there was a clear subsisting right of action for the remaining 50*l. per cent.* Other circumstances, however, occurred which rendered it unnecessary for the plaintiff to demand the other 50*l. per cent.* The plaintiff, in the present case, having received 35*l. per cent.*, ought to be treated as a trustee for the underwriters, if not of the whole sum awarded, at least to the extent of the 35*l. per cent.* Part of the consideration for the arrangement was the chance of getting back a portion of the goods, and which, under the then circumstances, was a very remote chance. If this be not the construction adopted, then the underwriters must be treated as purchasers to the extent of any future compensation, or it must be assumed that the assured thought fit to take in respect of the very matter for which he had already received 35*l. per cent.*, a compensation from the *Brasilian* government as a trustee for the underwriters. There is nothing in the terms of the memorandum to shew that the underwriters intended to part with their claim to salvage. The defendants are clearly entitled either to

1835.

BROOKS

v.

MACDONNELL.

1835.
 BROOKS
 v.
 MACDONNELL.

the whole or a part of the money. If there be nothing in the documents, and which there is not, to deprive the underwriters of salvage, and to give it to the assured, then, according to the rules of law, the underwriters are entitled to it. The underwriters do not claim under, but *dehors* the policy, and by the rules of law. There is no evidence that the underwriters intended to give up any thing to which they were entitled by law. The policy and the memorandum must be considered with reference to what was then passing before the parties. The present fund could not then, by any possibility, be contemplated by them. If it had been intended that the assured should be entitled to the compensation, it would have been so stated in the memorandum. The right of the underwriters cannot be taken away except by express contract. In *Blaauwepot v. Da Costa*, the company had expressly renounced the salvage. It was so argued by the Attorney-General, and the fact was also so stated by the learned Judge. In *Tunno v. Edwards*, the agreement must have been interpreted to mean, that the assured were to be entitled to 50*l. per cent.* to be paid on account, and not in liquidation of the whole.

Mr. Koe, for the defendants, the bankers.

The LORD CHIEF BARON, (without hearing the reply).— Upon full consideration, I entertain no doubt whatever about the case. I certainly did entertain some doubt at one time, but that doubt was entirely removed in the course of the argument; and I will not, therefore, take any time to consider of this case, but will dispose of it at once. I do not, in any manner, dispute any of the general principles laid down in the course of the argument on the part of the defendants in this case. A policy of assurance is clearly only an instrument of indemnity. As a general rule, it cannot be carried further. It is a rule, also, that in all cases of total

1835.

BROOKS

v.

MACDONNELL.

loss, salvage belongs to the underwriter, and he pays all the expenses. It is also clear, that whenever the underwriter adjusts a partial loss, he still remains liable on the policy, and may go on paying partial losses exceeding in the whole *cent. per cent.*, and may ultimately have to pay a total loss of *cent. per cent.* Such a case is possible. The question is, what is the meaning of the contract in this case? To enable me to resolve this, I must endeavour to judge what was the intention of the parties. Looking at the facts stated on both sides, I can feel no doubt that the assured were entitled to some compensation. No doubt is suggested as to their right to bring an action immediately after the loss was ascertained; but whether they should at that time bring an action or wait the possible restoration of the goods seems to have been matter of doubt. It has been contended on the one side, that I should treat this as a case of a total loss, and that the 35% *per cent.* paid by the underwriters must be considered as a payment by them in respect of a composition, that is, as if they had paid 100% *per cent.* The necessary consequence of this would be, that the underwriters would be entitled to the whole of the money, deducting the expenses of recovering it. The first question is, can I bring the case to that? I think I cannot: because I find that when an abandonment was proposed by the insured, the underwriters rejected it. It is quite clear that they then considered that they might affect their interest, if they accepted the abandonment. They must have had some reason for refusing it; and it is not disputed that they did reject it. I cannot now treat it as if one party had insisted on a total loss, and the other had denied it, and had contended that it was a partial loss only. In such a state of circumstances the parties would probably meet, and the underwriters would say—taking this as a partial loss, we are willing to pay all expenses, and to furnish you with the means of recovering the goods; or if you will relinquish all claim on us, we will pay you 35% *per cent.*

1836.

BROOKS

v.

MACDONNELL.

One reason why this cannot, as it appears to me, be treated as a case of total loss is, that there is no apparent reason why they should not have been entitled to receive 100*l. per cent.*, and there is no evidence for what reason they consented to take less. In the absence of any distinct evidence upon the subject, I think I cannot consider it as a case of total loss. The next question is, how are we to treat it as a case of partial loss? In ordinary cases, the underwriter and broker estimate partial loss at so much *per cent.*, which is paid, and the policy remains as before, and is not in any manner cancelled. I have been a good deal struck by the argument that the policy being only a contract of indemnity, if a partial loss be incurred, and is paid for, and the insured gets indemnified *aliunde*, the underwriter is entitled to restitution; and it occurred to me, whether it was not probable, in the present case, that the underwriters had calculated the expense which might be incurred in an attempt to recover the goods, and had paid the 35*l. per cent.* in respect of that expense. The result of that would be, that whatever might be the expense incurred, would be answered by the 35*l. per cent.*; but if not incurred, would have come back in reduction of the 100*l. per cent.* Another result would have been, that if the insured had recovered the goods, and the 35*l. per cent.* besides for expenses, the underwriters would have said, as you have recovered the goods and the expenses, pay us back our 35*l. per cent.* And in this case, if this had been a mere naked settlement of a partial loss, I should have thought the expenses had been incurred for the benefit of the underwriters. But I cannot treat this as a mere naked partial loss, in which, without going into particulars, a given sum is taken for a partial loss; for it would not be consistent with the terms of the policy, because the underwriter adjusts a partial loss, on the ground that he continues liable to other partial losses, and also to the entire loss. In the present case, it is clear, that the loss must have been treated

as a partial loss; and that the underwriters, by paying the 35*l. per cent.*, purchased an exoneration from all further liability in respect of loss. It cannot be doubted, that if the goods had been restored shortly after the arrangement took place, and the ship containing them had been afterwards lost, the assured could not have recovered on the policy. It is quite clear that neither party contemplated the settling of a total loss. I must consider that they intended to effect an arrangement by which the underwriters, representing to the assured that there was fair ground for expecting that their goods would ultimately be returned, though some loss might be incurred by the delay in the sale, said, take 35*l. per cent.* from us, and absolve us from all further claims; and we, on the other hand, will in like manner release you from all further demands. I so interpret the contract; and it appears to me that no other reasonable construction can be put upon it consistently with the conduct of the parties. How can I possibly assume that the assured would be so absurd as to give up 100*l. per cent.* for 35*l. per cent.*, when the full demand was not in any jeopardy? Or that the underwriters would be absolved from a loss total or partial, without paying some consideration for it? I consider that the underwriters in effect said, we consider this as a partial, and not a total loss. If you will also treat it as such, and will discharge us from all future liability, by putting an end to the policy, we will give you a liberal compensation.

It has been said that the cancelling of the policy does not defeat the right of the underwriters to salvage. This, however, means nothing more than that when a total loss is adjusted, and the policy is delivered up, the underwriters are entitled to salvage, paying the expenses. But the contract is put an end to, by the payment by the underwriters of the *cent. per cent.* But it is entirely different in the case of a partial loss. If I could consider this as the case of a total loss, then the underwriters would be

1835.

Brooks
v.
MacDonnell.

1835.

BROOKS
v.

MACDONNELL.

entitled to the whole of the money. I cannot, however, consider it as a total loss, for the reasons I have already stated.

Considering this, therefore, as I am obliged to do, as a contract by which the assured gives up all claim on the underwriters for 35*l. per cent.*, and which the underwriters accordingly pay, I am of opinion that the underwriters cannot establish a claim to any part of the fund in Court. I am inclined to think that the underwriters in this case are more excusable than they are supposed to be in some other cases in the Courts of law. I think that, under the circumstances of this case, there should not be any costs on either side.

July 13th.
December 3rd.

A Court of equity will not compel a corporation to execute a legal assurance of corporate property in pursuance of a contract not under seal, unless valuable consideration for the contract be expressly proved, or evidence be given of acts done or omitted by the contracting party, on the faith of the expressed legal assurance.

Quære, whether a corporation can borrow money except under seal?

WILMOT and Others v. The Corporation of COVENTRY.

BEFORE the passing of the late act for the regulating municipal corporations (a), the affairs of the corporation of *Coventry* were conducted by certain members of their body called the council, who held monthly meetings at the *Guildhall*. At these meetings, orders, called orders in council, were made, relative to the matters discussed before them; and entries of such orders were made in the books of the corporation; which entries, when they concerned the disposal of property, were in fact the instructions from which legal assurances were prepared by the town clerk.

In the year 1802, Mr. *Inge* being then the town clerk, the following entry was made in the minute book:—"3rd August, 1802. Before *John Mullis*, Esqr., Mayor, &c., (Here followed the names of several aldermen, and amongst them Alderman *Williamson*.) Whereas Alderman *Williamson* did, on the first day of *January* now last past,

(a) 5 & 6 Will. 4, c. 76.

advance and lend to this corporation at interest, after the rate of 5*l.* per cent. the sum of 500*l.*, and for which no security hath yet been given to him: It is therefore now ordered and agreed, that Alderman *Williamson* shall have a mortgage security for the same 500*l.*, upon *Keresley* tithes. And it is further ordered, that *Inge & Carter* do forthwith prepare such mortgage."

1835.
WILMOT
v.
The Corporation
of COVENTRY.

From entries made in the books of the treasurer of the corporation, it appeared, that interest upon the sum of 500*l.* had been paid by the corporation to Alderman *Williamson*, from 1802 till 1815; the last entry being made in *January*, 1816, for the interest due the preceding *Michaelmas*.

In 1816, Alderman *Williamson* died, having by his will appointed the plaintiffs his executors; who now brought their bill, insisting that the entry so made in the minute book was, in fact, an agreement by the corporation to mortgage the tithes of *Keresley*, in consideration of the sum of 500*l.* lent to them by the testator; alleging also, that a large sum for principal and interest remained due to them on that security; and praying for an account and payment thereof, or that the corporation might be advised to convey and assure to them the tithes of *Keresley*, absolutely freed and discharged of all right of redemption therein, and might deliver up to them all deeds, &c., relating thereto.

The defendants, by their answer, stated; that they did not believe, that Alderman *Williamson* had ever lent 500*l.*, or any other sum, to the corporation for their own use; but they believed, that, being a very influential man, he in the year 1802 advanced 500*l.* for election purposes, which advance he prevailed upon the corporation to enter into their books. That *Williamson* was from *October*, 1801, to *February*, 1803, one of the auditors of accounts of the receiver and treasurer of the corporation; and yet such advance did not appear to have been entered in any

1835.
 WILMOT
 v.
 The Corporation
 of COVENTRY.

of the accounts. That though interest appeared to have been paid upon that sum, yet the first payment was in *May*, 1803, and then only for eight months previous to the 25th of *March*, in that year. That no interest appeared to have been paid after *January*, 1816, though *Williamson* did not die till the *October* following.

Mr. *Temple*, and Mr. *Elmsley*, for the plaintiffs.—Though at law a corporation is not bound except by seal, that is not so in equity: *Marshall v. Corporation of Queenborough* (a). [*Alderson*, B.—There the Vice Chancellor said, he was inclined to think, that a corporation might be compelled to make a legal grant of their property in pursuance of a regular corporate resolution, if upon the faith of that resolution expenditure had been incurred. Here no expenditure has been incurred in pursuance of the resolution.] 'I here are many other things besides expenditure, which if done or suffered by *Williamson* in pursuance of the agreement would be sufficient to raise a consideration; as, for instance, a right compromised. Here there was an agreement for a future mortgage; and *Williamson*, in consideration of that agreement, forbore to sue the parties, though in fact they were personally liable. Besides, the resolution amounts to a distinct admission by one party, that the other had done every thing he had to do, and that the admitting party would carry into execution all that was legally required to be done, to complete the contract. Though no further sum was advanced after the agreement, interest was regularly paid.

Mr. *Simpkinson*, and Mr. *Koe*, for the defendants.—The agreement is nearly thirty-five years old, and the bill has been filed nearly twenty years after payment of interest has ceased. There is no evidence of any money having

(a) 1 S. & S. 520.

been advanced; still less, that it was advanced on the faith of a proposed mortgage: therefore, the solitary case cited does not apply. But supposing the entry to be evidence, *valeat quantum*, of payment of the money, it shews that the original transaction was a mere loan, and not a mortgage. Then the subsequent transaction could not alter the nature of the case. Suppose an individual had said to his debtor, in consideration of 500*l.* which you have advanced to me, I hereby agree to give you a mortgage:—that would not be supported as a contract, in equity. This is a mere *nudum pactum*, to grant a security to a person, who has advanced his money without any security at all. How then is this corporation benefited, or how bound by an entry such as this, which has been made without any consideration? Besides, it is admitted, that, at law, a corporation will not be bound by any agreement not under seal relating to the corporate property. The general rule in equity is the same: *Taylor v. Dulwich College* (a), *Winne v. Bampton* (b). The case which has been cited, notwithstanding the *obiter dictum* of the Vice Chancellor, is not different from the others in principle.

1835.

WILMOT

v.

The Corporation
of COVENTRY.

Mr. *Temple* in reply.—The bill is filed within the requisite time. The entry, if it be binding, establishes the fact of payment, which need not be proved *aliunde*. The general rule which has been stated, respecting contracts not under seal made by corporations, is qualified in Courts of equity. The case of *Taylor v. Dulwich College* has been corrected by a later case, mentioned in Mr. *Fonblanque's Treatise* (c). In *Macher v. The Foundling Hospital* (d), Lord *Eldon* threw out an opinion that a corporation might, under certain circumstances, be bound by the

(a) 1 P. W. 656.

See Treat. Eq. Vol. 1, p. 306.

(b) 3 Atk. 475.

(d) 1 Ves. & B. 188.

(c) *Maxwell v. Dulwich College*.

1835.

WILMOT

v.

The Corporation
of Coventry.

acquiescence of some of its members in a breach of covenant committed by their lessee. [*Alderson, B.*—My difficulty is, to ascertain whether or not any act was done by *Alderman Williamson*, in consequence of this resolution. If upon the faith of a corporate resolution a man were to lay out money, and a Court of equity were to hold, that, under such circumstances, the corporation was not bound, that would be enabling them to commit a fraud. But that does not apply, where a man having done all the acts connected with the loan, goes afterwards and gets from them a security.] The transaction is in itself an equitable mortgage, for which the Court would decree a foreclosure. It has the same effect in equity, as if an actual mortgage had been granted at the time of the entry; namely in *August, 1802*. If the Court sees clearly that this was an agreement to grant a mortgage, though in consideration of a bygone loan, and that there was regular payment of interest, and that the party lending has not proceeded to enforce payment of the principal, the party who has had the benefit of the forbearance will be decreed to fulfil his contract. If the plaintiffs are not entitled to a mortgage, they are simple contract creditors. [*Alderson, B.*—Can such a corporation as this borrow money except under seal? (a)] If the loan were not valid as against the corporation, the individual lenders would be personally responsible. The agreement to mortgage takes away the benefit of the remedy against the individual, and that raises a consideration to have a legal mortgage executed. This is an agreement to mortgage. The entry is only a recognition of an antecedent agreement, to lend the money on mortgage. A man would not lend the money without a stipulation for its repayment; and if a corporation are not bound by a loan of money, *qua* loan, the inference is, that, at the time of the original advance, there was an

(a) *Broughton v. Manchester Waterworks Company*, 3 B. & A. 1.

agreement to grant a mortgage. That being so, the entry completes the agreement; for, after reciting the loan by Alderman *Williamson* of the 500*l.*, and that “no security hath *yet* been given to him,” it directs that “he shall have a mortgage security for the same.”

1835.

WILMOT

The Corporation
of COVENTRY.

ALDERSON, B.—In this case, which I reserved, in order that I might have time to examine into the circumstances, I now propose to give the judgment of the Court.

Dec. 3rd.

This was a bill filed by the plaintiff, the representative of a deceased Alderman *Williamson*, to compel the defendants to execute in his favour a security, under their corporate seal, for the sum of 500*l.* antecedently lent by the deceased to the defendants. The only proof of this loan, or of any agreement respecting it, is to be found in a minute in the corporation books, dated 3rd *August*, 1802; which after remaining unheard of for many years, nearly twenty at the least, was, it seems, lately discovered by the activity of an inquiry lately instituted for the purpose of improving the state of municipal corporations; and this suit in equity appears to have immediately followed:—a consequence, I am quite sure, never contemplated by those who directed such an inquiry to be made. The memorandum is as follows. [His Lordship then read the minute.] In addition to this, and obtained by the same inquiry, there has been produced evidence of payments apparently of interest; ending, however, in 1816; at which period, it seems, Alderman *Williamson* died.

It certainly is a remarkable circumstance, that, at his death, no notice of so large a claim on the corporation should have been made by his legal representatives, which would rather lead to an inference, that no notice could have been taken of it in his will, or in any statement of his property left behind him. But the Court cannot proceed on this ground; nor does there appear to be any circumstance, in addition to the mere lapse of time, which

1835.

WILMOT

v.

The Corporation
of COVENTRY.

does not amount to twenty years, on which to raise a presumption of payment in this case. If, therefore, the mortgage deed had been duly executed, there is nothing which would have barred the plaintiffs' right to recover under it.

The remaining question then is, whether there ever was a contract under which Alderman *Williamson*, or his representative, could have compelled the corporation of *Coventry* to execute the mortgage in question. The plaintiff's counsel, in support of their view of the case, principally relied on a *dictum* of Sir *John Leach*, in *Marshall v. The Corporation of Queenborough* (a), in which that learned Judge laid it down, that if a regular corporation resolution, passed for granting an interest in a part of the corporation property, and upon the faith of that resolution expenditure was incurred, he was inclined to think, that both principle and authority would be found for compelling the corporation to make a legal grant in pursuance of that resolution.

It is not at all necessary to question the accuracy of this *dictum*; which, however, appears to me to depend upon the acknowledged principle on which a Court of equity proceeds, for the prevention of fraud. The Vice Chancellor goes on the ground of the subsequent expense on the faith of the regular corporation resolution; and, if it be correct, that acquiescence by a corporation would bind them, for which *Macher v. The Foundling Hospital* (b) is cited as an authority, it would follow, *à multo fortiori*, that the position above laid down would be correct. But, on the other hand, in the case of *Taylor v. Dulwich College*, the Lord Chancellor expressly decided, that a corporation could not bind itself by contract as to its revenues unless under seal; and this is confirmed by *Winne v. Bampton* (c). Unless, therefore, an equity can be raised

(a) 1 Sim. & Stu. 520. (b) 1 V. & B. 188. (c) 3 Atk. 473.

In this case, out of some subsequent acts done or omitted by *Williamson*, on the faith of this expected mortgage, I do not see how I can decide in favour of the plaintiffs. Now, here it appears, from the memorandum dated *August*, 1802, that the money had before then been lent to the corporation at interest; and I can see nothing which *Williamson* does, or undertakes to do, as the consideration for this subsequent agreement on the part of the corporation. He does not undertake to give time for the payment, or to forbear suing them. His situation as to his claim on the corporation was in no degree changed by the agreement. Nor do I see any fair inference to be drawn from the word *yet*, as importing an original agreement for a security, when the money was first advanced.

It therefore appears to me, that, according to the authorities, this is not a contract binding the corporation, not being under the corporation seal; and that the other circumstances are not sufficient to raise an equity, such as would have been raised in *Marshall v. The Corporation of Queenborough*, in case the facts suggested in that report had been made out to the satisfaction of the Vice Chancellor.

Upon the whole, I think that the bill must be dismissed with costs.

Decree accordingly.

MARGARESON *v.* SAXTON.

Nov. 7th, 15th.
Dec. 3rd.

THE plaintiff in this suit obtained a verdict for 9*l.* 9*s.* 6*d.*, in an action against one *Eaton*, for goods sold and

A conveyance made to a creditor for a valuable consideration sufficiently

strong in itself to influence the debtor to make it, is not "voluntary" within the stat. 7 *Geo.* 4, c. 57, s. 32, for relief of insolvent debtors, though part of the consideration consists of a pre-existing debt.

Semble, that though the bill charges certain facts, and that the defendant knew them, yet if it omit to charge that he admitted that he knew them, evidence of his admissions on that subject cannot be read.

1835.

MARGARESON
v.
SAXTON.

delivered, which action was tried at the *Derby* Summer Assizes, at the beginning of *August*, 1832; and leave was given to the plaintiff to issue execution on the 16th day of the same month. Soon after the trial, the plaintiff received a letter from *Turner*, *Eaton's* attorney, dated the 10th of *August*, requesting the plaintiff to send him the probable amounts of the damages and costs in the action, and expressing a wish that no further expenses might be incurred, by taxing costs or otherwise, till the plaintiff should hear from him again, as in all probability the matter would be settled.

The plaintiff sent an account of the costs, but heard no more from the defendant's attorney; and on the 28th *August*, the sheriff's officer was sent to levy execution on *Eaton's* effects for the plaintiff's debt; no goods, however, were found on the premises, and it appeared that a sale of *Eaton's* effects had taken place on the 25th.

Eaton having disappeared, the plaintiff caused search to be made for him, and found him in *December*, 1832, in the *Fleet* prison, having been arrested at the suit of one *Crooks*. *Eaton* soon afterwards petitioned for his discharge under the Insolvent Act, when his petition was opposed by the plaintiff, and he was remanded. On the following day he, at the instance of *Crooks*, was discharged out of custody.

In *February*, 1833, *Eaton* was arrested by the plaintiff; and, in *May* following, presented his petition to the Insolvent Court at *Derby* for his discharge, when the commissioner ordered that he should be discharged after remaining eight months in custody at the suit of one or more of his creditors. In *July* following, all the real and personal estate of the insolvent were conveyed and assigned to the plaintiff as his assignee, upon trust for the creditors.

The plaintiff now brought his bill against the defendant, charging that the letter sent by *Turner* to the plain-

tiff was the result of a plan formed by *Turner* and *Eaton* to defraud the plaintiff, and to dispose of *Eaton's* real and personal estate, before the plaintiff should issue execution. That in furtherance of this plan, and with a view to give a fraudulent preference to the defendant, who was fully aware of the plaintiff's verdict, and of *Eaton's* insolvent circumstances, *Eaton*, under the advice, and with the assistance of *Turner*, executed certain indentures of lease and release, bearing date the 14th and 15th of *August*, 1832, and made between himself of the one part, and the defendant of the other part, whereby, for the consideration therein expressed, he conveyed all his real estate to the defendant in fee. The bill further charged that the estate was sold at an undervalue; that *Turner*, the attorney employed to defend the action, prepared the conveyance; that he had never been employed before by the defendant; and that before the deeds were executed, no examination of the title took place. The bill prayed that these deeds might be declared fraudulent and void against the plaintiff as assignee of the estate and effects of *Eaton*.

There was a statement in the bill, that on each occasion of *Eaton's* petitioning to be discharged under the insolvent act, that Court had declared the conveyance in question to be fraudulent and void.

The defendant, by his answer, stated that in *January*, 1831, he, at the request of *Eaton*, joined with him in a security for 50*l.*, to Messrs. *Parker, Shore & Co.*, bankers, *Sheffield*, and took a counter security from *Eaton* and his brother for that amount. That in *November*, 1831, *Eaton* borrowed 5*l.* of the defendant, and in *January* following 40*l.* more. That on the occasion of the last-mentioned loan, the defendant took a note from *Eaton* alone, for 95*l.*, the amount of the three sums, and destroyed the previous note given by *Eaton* and his brother. That the defendant had no further communication with

1835.

MARGARESON
v.
SAXTON,

1835.

MARGARESON
v.
SAXTON.

Eaton till *August*, 1832, when the latter called on the defendant, and said he was in want of more money to pay the expenses of a lawsuit which he had lately lost. That until he received this information, the defendant had no knowledge or reason to believe that the plaintiff had been engaged in any lawsuit; and that he refused to advance any sum of money unless he had some security. That *Eaton* then said he was willing to sell his lands, at the same time informing the defendant that there was a mortgage upon them for 250*l.* That, after some negotiation, the defendant agreed to give 350*l.* for them, out of which the sum of 50*l.*, due to Messrs. *Parker & Co.*, was to be discharged. That the defendant then, at the recommendation of *Eaton*, employed *Turner* to prepare the conveyances of the 14th and 15th of *August*, 1832; which were prepared and executed accordingly, and the consideration money paid.

The defendant stated his ignorance of the proceedings alleged to have taken place in the Insolvent Debtors' Court in *London*; but he admitted that both he and *Eaton* were examined at *Derby* touching the conveyance in question; and that the commissioner expressed an opinion that *Eaton* had fraudulently, with an intent to give an undue preference, made away with part of his property.

The cause now came on for hearing. On the part of the plaintiff, no documents were put in evidence by which the grounds of the opinion of the Insolvent Debtors' Court could be legally proved. On the part of the defendant, evidence was given to shew that the property was sold at its real value, and also to explain the fact of the title not having been inquired into. This evidence is commented upon in the judgment.

In order to prove that the defendant had notice of the plaintiff's action before he took the conveyance of the insolvent's estate, the counsel for the plaintiff offered evidence of declarations of the defendant to that effect.

1835.

MARGARESON
v.
SAXTON.

It was objected for the defendant, that this evidence was inadmissible, on the ground that no admissions or declarations of the defendant to the above effect were charged in the bill. All that was charged was, that the defendant *knew* of the action at the time stated, not that he *admitted* having that knowledge.

For the plaintiff, it was contended, that the object of the proposed evidence being to rebut the statement made on this subject in the answer, it ought to be received.

ALDERSON, B., received the evidence *de bene esse*, observing, that there was great doubt of its admissibility, inasmuch as the declarations not having been charged in the bill, the defendant had not had a proper opportunity of explaining them. On the other hand, there was much difficulty in rejecting the evidence altogether.

The cause then proceeded on the merits.

Mr. *Twiss* and Mr. *Hayter*, for the plaintiff.—The conveyance to this defendant was adjudged to be void by the Insolvent Court, on the ground of fraudulent preference. In *Stuekey v. Drewe* (a), it is laid down by Sir *John Leach*, that if a deed be made with a view to give a fraudulent preference to any creditor, it is a voluntary conveyance within the statute (b). [*Alderson*, B.—The statute

(a) 2 Myl. & K. 190.

(b) 7 Geo. 4, c. 57, s. 32, whereby it is enacted, that if any prisoner, who shall file his or her petition, for his or her discharge under this act, shall, before or after his or her imprisonment, being in insolvent circumstances, voluntarily convey, assign, transfer, charge, deliver, or make over any estate, real or personal secu-

rity for money, bond, bill, note, money, property, goods, or effects whatsoever, to any creditor or creditors, or to any person or persons in trust for, or to or for the use, benefit, or advantage of any creditor or creditors, every such conveyance, assignment, transfer, charge, delivery, and making over, shall be deemed and is hereby declared to be fraudulent and void,

1835.

MARGARESON
v.
SAXTON.

goes farther than that. A perfectly honest conveyance, if it be voluntary, is within the statute. The principle at law is, that the act must be spontaneous, and move from the party making it, without any other operating cause. *Arnell v. Bean* (a).] Here there was not the least pressure for the foregone debt. The defendant saying that he would not advance more money unless security was given, does not make the conveyance less voluntary. In *Stuckey v. Drewe*, a case very similar to the present, there appears to have been some pressure by the creditor, and yet the deed was held voluntary. [*Alderson, B.*—There the Master of the Rolls appears to proceed on the ground that the debtor ought to have gone to the creditor, who was more pressing. I should doubt whether that was a sufficient ground.] At all events, when the conveyance was made, the defendant had full notice of *Eaton's* insolvency. The transaction, therefore, is on that account fraudulent and void; and admitting that the full consideration was given for the property, that will make no difference. [*Alderson, B.*—How can fraud be presumed, if the full value was given? In bankruptcy, there is a technical reason for the avoidance of contracts made by bankrupts; but even there the legislature has mitigated the rule by protecting real transactions in many cases.] The protection in those cases is destroyed by notice of the bankruptcy. The intention of the Insolvent Act was to prevent insolvents dealing with their creditors at all, unless pressed. Here the Court of Insolvent Debtors was of opinion, that the

as against the provisional or other assignee or assignees of such prisoner appointed under the act: provided always, that no such conveyance, assignment, transfer, charge, delivery or making over, shall be so deemed fraudulent and void unless made within three months before the commencement

of such imprisonment, or with the view or intention by the party so conveying, assigning, transferring, charging, delivering, or making over, of petitioning the said Court for his or her discharge from custody under this act.

(a) 8 Bing. 87; 1 M. & Scott, 151.

conveyance was fraudulent. [*Alderson*, B.—I cannot take notice of that. *Saxton's* examination should have been put in evidence to shew the grounds on which the Court came to that conclusion.]

1835.
MARGARESON
v.
SAXTON.

Mr. *Stuart*, and Mr. *J. Russell*, for the defendant.—This was no doubt a voluntary conveyance in one sense, namely, that it was the result not of compulsion, but of a contract. This is not a case of voluntary preference. In such a case there is no other contract, except that the creditor shall have the estate conveyed to him. In this case the valuable consideration which was given puts an end to all the law which has been referred to. The plaintiff has failed to shew that the defendant is involved in the fraud which he imputes to the insolvent. Can he then say that if a fraud is concocted by the insolvent and another person, unknown to the purchaser, the latter, dealing *bond fide* for a valuable consideration, is to have his contract vitiated in a Court of equity? The defendant knew nothing of the insolvent circumstances of *Eaton*. [*Alderson*, B.—Under the act of Parliament, his knowledge is immaterial. If the transaction is *bond fide*, it is not voluntary within the act; otherwise, if it be colourable. Is a conveyance for a valuable consideration voluntary?] The meaning of a voluntary conveyance, is a conveyance to a creditor, or some one in trust for him, coming from the party making the conveyance without any consideration, or in consideration of a pre-existing debt. If in addition to that you can shew that the party was insolvent at the time of making the conveyance, and that it was his intention to avail himself of the Insolvent Act, then the transaction is within the act, and void. These circumstances did not all occur in the present case. Not only was the transaction *bond fide* on the part of the defendant, but there is neither allegation nor proof that *Eaton* was insolvent at the time he executed the deeds. There is no

1835.

MARGARESON
v.
SAXTON.

evidence of any debt at that time, except the plaintiff's. *Arnell v. Bean* (a) is clearly in favour of the defendant.

Mr. *Twiss* having commenced his reply, was interrupted by the Court.

ALDERSON, B.—My difficulty is, to decide this question without an examination of the parties. Is there any way in which I could be relieved from that difficulty? Upon the evidence as it stands upon the depositions and documents, it is not a voluntary conveyance. But I cannot shut my eyes to the fact, that the Judge, who has had an opportunity of seeing the parties, came to an opposite conclusion. Perhaps, if I had the same means, I should come to the same conclusion. I cannot send such a case as this to a jury; for the sum in dispute would be consumed in the expense of such an inquiry. I will take this opportunity of expressing an opinion which I have already expressed (b), that I wish I had the power of examining witnesses in this Court. If the parties by consent will give me that power which I wish all Courts of equity had, I will examine them.

It was then arranged that the cause should stand over for the purpose of examining the parties *viva voce*, but this arrangement was afterwards abandoned.

Mr. *Twiss* was, on a subsequent day, heard in reply.—The case of *Arnell v. Bean* does not decide the present question, though the Court expressed an opinion that fraud in these cases is a question for the jury, and that there the particular circumstances did not invalidate the conveyance. That was an action of trespass brought to displace the person whom the purchasing creditor had put in possession of the property. The question between

(a) 8 Bing. 87; 1 M. & Scott, 151. (b) Ante, pp. 139, 140.

that creditor and the assignee under the Insolvent Act was left entirely open. That may be done in this case, by leaving the question to a jury: but the fund is too small for that; and *Stuckey v. Drew* is an authority for the plaintiff. *Eaton's* insolvency at the time of the conveyance is proved by his having been arrested for so small a debt; and his intention to take the benefit of the act at that time is shewn by the various facts charged in the bill. The date and registration of the deed on the 16th of *August*, the day on which the plaintiff's execution might have taken place, the letter from the attorney of the insolvent written 'to gain time, the sale of his effects, and his imprisonment at the suit of *Crooks*, are all circumstances shewing that intention. Then whatever, under the bankrupt acts, constitutes fraudulent preference, is, under the insolvent acts, evidence of a voluntary conveyance. Now here there was no pressure for the former debt. All that the defendant did was to ask for a security for the new debt. [*Alderson, B.*—Then, if there were a debt of 10*l.*, and an advance of 1000*l.*, the advance would not be valid.] The onus of shewing the pressure ought to be on the party who sets up the validity of the sale. Here, however, the application of the debtor was sufficiently spontaneous. *Poland v. Glyn* (a), *Crosbie v. Crouch* (b), *Singleton v. Butler* (c).

ALDERSON, B.—If the case of *Arnell v. Bean* was inconsistent with that of *Stuckey v. Drewe*, so that the latter case could in no way be reconciled with the former, I should take time to consider this question, because there would be great difficulty, without much and anxious deliberation, in deciding between the conflicting opinions of Judges for whom one is disposed to entertain the greatest respect. But the case of *Stuckey v. Drewe* may be supported on its particular

1835.

MARGARESON
v.
SAXTON.

(a) 2 D. & R. 310.

(b) 11 East, 256.

(c) 2 B. & P. 283.

1835.

MARGARESON

v.
SAXTON.

facts, and may be reconciled with that of *Arnell v. Bean*. The Court, in the latter case, laid down a general rule of construction, upon the 32nd section of the Insolvent Act, which is expressed in better terms than I can express it, namely, that "the word 'voluntary' must have some meaning of its own distinguishable from that of fraudulent; in the first place, because there could be no occasion to make an enactment that a fraudulent deed should be void, which the common law would have itself declared it to be; and, in the next place, because this very section declares that assignments voluntarily made under the circumstances therein mentioned, should be deemed, and shall be, fraudulent and void." Now, no doubt, if the conveyance were, *ipso facto*, fraudulent, it would be unnecessary to say that it shall be *deemed* so. It is clear, therefore, that the word "voluntary," in this section, has some different meaning from the word fraudulent. Then what is the sense given to it in *Arnell v. Bean*? The Court says it is intended to embrace two classes of cases; one where "an assignment is made without such valuable consideration as is sufficient to induce a party acting really and *bona fide* under the influence of such considerations;" and another, where "an assignment is made in favour of a particular creditor spontaneously and without any pressure on his part to obtain it." Now, if the advance of money be made *bona fide*, although there be a pre-existing debt, yet, if the consideration operating on the mind of the party be partly that which constitutes the advance, and partly payment of the debt, I do not see how the conveyance is voluntary, within the 32nd section of the statute: for there is an inducement to do what, except for that consideration *bona fide* operating upon his mind, he would not have done. But, where the party voluntarily comes forward and says to his creditor, let me make you a conveyance, in order to secure to you payment of that debt which I owe you—this being a spontaneous act on

1835.

MARGARESON
v.
SAXTON.

the part of the debtor, without anything operating on his mind to give the creditor a preference, will make the conveyance voluntary within the statute. On the other hand, if the creditor has pressed for payment of the debt, and can shew that he has taken pains to secure it, that circumstance also will prevent the conveyance from being voluntary. Therefore, the conveyance will not be voluntary within the statute, either if there be a consideration *bond fide* acting on the mind of the party, or if there be circumstances of pressure on the part of the creditor.

In the case of *Arnell v. Bean*, the Court of *Common Pleas* gives a plain, simple, and easy construction of the act of Parliament. In *Stuckey v. Drewe* the Master of the Rolls must have decided on the ground that it was a colourable transaction between the parties; and, although there was an advance of 60%, and an anterior debt of only 40%, he must have thought that the additional advance was not a real transaction, but that it was colourable, in order to conceal that which was the real intention of the parties, namely, to give a preference to the insolvent's uncle. The circumstances of the uncle taking the property without making any inquiry whether the nephew had a good title, and when he was in insolvent circumstances, and of the nephew going to pay the uncle, who thereupon made a fresh advance to him, strongly tend to shew that the transaction was colourable. The case of *Stuckey v. Drewe*, therefore, is consistent with that of *Arnell v. Bean*, for the latter equally recognises those cases where the transaction between the parties being colourable, the conveyance is, on that account, deemed voluntary. But it is not laid down in any case, that, if the transaction is *bond fide*, the conveyance may nevertheless be voluntary. If it were so laid down, I should, with great deference, be disposed to disagree with that authority.

To apply these principles to the present case. Here an advance of money is made to the insolvent at the time

1835.

MARGARESON
v.
SAXTON.

the transaction takes place. The question is, whether this was a *bond fide* transaction, and whether the moving cause on the part of the insolvent was the advance of the money for the sale of the equity of redemption of these premises. The property consisted of seven houses, and inconsiderable allotments made under an inclosure act. The seven houses had been mortgaged to the trustees of a society. The mortgagees had made inquiry as to the title, and, being satisfied on that head, had advanced 250*l.* on that security. That, therefore, was a charge upon the property, and all the insolvent could sell was the equity of redemption. It is said that it was let at 3*l.* *per annum*, which, after the necessary deductions for rates and taxes, left only 27*l.* *per annum*. Now I find, upon calculation, that the principal, which gives 27*l.*, at 7*l.* *per cent.*, is about 375*l.* Here the property was valued only at 355*l.*, and was sold for 380*l.* We might, further, take into account the necessary expenses of preparing the conveyance, amounting to 16*l.* 16*s.*, and which, in this case, if not included in the purchase-money, would increase the whole sum given to about 396*l.* If it were necessary, it would be reasonable to take that sum into consideration; but it is not necessary, for there is no evidence of a sale of the property for less than its fair value. Then, if not, what are the other circumstances of fraud?

It appears that *Saxton* was under an engagement to pay a debt of 50*l.*, which had before been incurred by *Eaton*, and for which he had given his promissory note, *Saxton* joining as surety. *Saxton* had afterwards advanced to *Eaton* 45*l.* in monies numbered. The amount of these sums was 95*l.*, and the mortgage debt in the property was 250*l.*; so that the purchase-money being 380*l.*, left 35*l.* for the sale of the equity of redemption. It appears, therefore, that 95*l.* was the debt due to *Saxton*, or for which he was in fact responsible; and he was to pay, in addition, 35*l.*; and, if the statement of the attorney is to

1835.

MARGARESON
v.
SAXTON.

be believed, he thought that the sum of 35*l.* was to be given in payment of the sum due to *Margareson*, for the debt and costs in the action. Then, what is there in the circumstances of this case to shew me that it was fraudulent on the part of *Eaton* and *Saxton*, or that it was not conducted according to the rules which govern persons in ordinary transactions? The evidence is that *Eaton* was in embarrassed circumstances, and wanted a fresh advance of money; and, upon *Saxton* being applied to, he refused to make a fresh advance unless some security was given for it; and then *Eaton* said, "I had better sell you the property I have, which you can take as a security both for the former debt and for the money you are about to advance;" to which terms *Saxton* agreed.

I cannot say, on this documentary evidence alone, without seeing the witnesses, that it is to be inferred that the operating cause, which induced *Eaton* to make the conveyance in question, was not the 35*l.* which he so gained, and the undertaking, on the part of *Saxton*, that he would pay the 50*l.*, for which he was not really responsible. It does not appear to me that I am, from these circumstances, to infer fraud, or to say that the persons who swear to their belief that the operating cause was the one above stated, have made a false statement. Besides, what evidence is there that *Eaton* was insolvent at the time of this transaction? No doubt there were circumstances of suspicion, but fraud must be proved expressly. I am not to infer fraud, because it may come across my imagination that there are circumstances of suspicion in the case which I should have been better pleased had not existed.

Upon the whole, I am of opinion that the plaintiff has failed to make out that this conveyance was voluntary within the meaning of the act, or that it was made by a party who was at the time in insolvent circumstances. At the same time there are circumstances of suspicion; and, if the matter in dispute had been greater, I should have

1835.

MARGARESON
v.
SAXTON.

directed an issue. The bill, therefore, must be dismissed, but without costs.

Decree accordingly.

See *Davies v. Acock*, 2 C. M. & R. 461.

BARRY v. WOODHAM.

Nov. 10th.

Where husband and wife, who were living apart, had put in separate answers and appeared by different solicitors, separate costs were allowed, there being no evidence in the cause of the grounds of their separation.

THE bill was filed to carry into execution the trusts of a will, under which the wife of one *Corsbie* was entitled to a legacy and a share of the residue, to her separate use. *Corsbie* and his wife, living apart, put in separate answers, and appeared by different solicitors; and the question was, whether they were entitled to two sets of costs, or only such costs as would have been incurred, if they had only put in one answer.

The LORD CHIEF BARON.—I cannot go into the merits of the separation, which form no part of this case; nor can I impute blame to the husband, in the absence of any evidence on that subject. The parties must have their costs. Mr. *Spranger* tells me, that in one case, where trustees had severed in their answers, Lord *Alvanley*, under the special circumstances, allowed them their separate costs.

STORY v. JOHNSON.

Nov. 19th.

Where commissioners of partition are directed to divide lands equally between

the parties entitled, it is their duty, after dividing the lands into proportions of equal value in the market, to assign them to those parties respectively to whom they would be of most value, with reference to their respective situations in relation to the property before the partition took place. Therefore, where commissioners were directed to divide lands equally between A., B., and C., and they accordingly divided the lands into portions of equal value in the market, but assigned to A. an inn of which C. had been for many years the occupier, upon which he had expended money in improvements, and adjoining to which he had purchased property for the purposes of his occupation:—*Held*, that the adjudication of the commissioners was wrong, and that a commission should be directed to new commissioners, to be approved of by the Master.

Gross error in judgment, without positive proof of impartiality, is sufficient to enable the Court to set aside an adjudication made by commissioners of partition.

called the *George Inn*, situate in *Ifield*, in the county of *Sussex*, with certain remainders over, which never took effect; with remainder to *Elixabeth Linkon* for her life, with remainder to all and every the children and child of *Elixabeth Linkon*, as tenants in common in fee.

Upon the death of the testator, *Richard Hall* entered and took possession of the devised property. During his lifetime, *Elixabeth Linkon* died, having married one *Edward Jones*, by whom she had three children, *Edward*, *William Standard*, and *Richard*.

In *November*, 1820, *Richard Hall* demised the *George Inn* with several closes and tenements, forming part of the above estate, to *Joseph Johnson*, the father of the defendant *Johnson*, for twenty-one years. This lease was afterwards confirmed by two of the remainder-men; namely, *Edward* and *Richard Jones*. About the same time, *Richard Hall* demised other parts of the estate, for the same term, to *James Gardner*. In *April*, 1824, *Edward Jones* conveyed his reversionary one third share of the property to the plaintiff *Story*, in fee. In 1825, *Richard Hall*, the tenant for life, died; and in *June*, 1826, *Richard Jones* conveyed his one third share of the *George Inn* and the premises adjoining, occupied by *Johnson*, to *Johnson* in fee; and, about the same time, he conveyed his one third part of the residue of the property to *James Gardner* in fee.

In consequence of these various events, when the present suit was instituted, *Story* was interested in one third of the property in fee, *W. S. Jones* in another third in fee (subject however to a mortgage to *Johnson* for 600*l.*,) and *Johnson* and *Gardner* in the remaining third part in fee; and *Johnson* and *Gardner* were likewise in possession of the premises comprised in their respective leases.

The original bill was filed by *John Story*, *W. S. Jones*, and other parties, against *Johnson* and *Gardner*, praying for a partition of the *Ifield* estate; and for an account of the

1835.

STORY
v.
JOHNSON.

1835.

STORY
v.
JOHNSON.

rents and profits received by them, since the death of *Richard Hall*. *Johnson* and *Gardner*, having both died, the suit was revived against their real representatives.

The cause coming on to be heard before Lord *Lyndhurst*, at the sittings after *Trinity Term*, 1833; his Lordship ordered that a commission should issue, directed to certain commissioners to be named by the several parties; namely, two by the plaintiff, *John Story*; two by the plaintiff, *W. S. Jones*; and two by the defendants, the representatives of *Johnson* and *Gardner*; that the commissioners should divide the estate in question in three equal parts, and allot one part to each of the three parties. That all parties should produce before the commissioners the deeds and writings in their possession relating to the estate; and that the commissioners should examine witnesses as to the matters in question, by interrogatories, or otherwise as they should think fit.

At the meeting of the commissioners in pursuance of this decree, it was determined by the four commissioners chosen by the plaintiff, in opposition to the opinion of the other two, that Lot 1, which included the *George Inn*, should be given to the plaintiff *Story*; Lot 2, to the plaintiff *W. S. Jones*; and Lot 3, which included the premises lately held by *Gardner*, to the defendants; and they made their return accordingly.

A motion was now made on behalf of the defendants, that the return or certificate so made might be quashed, or that a new commission might be issued directed to new commissioners to divide and separate the estate as directed by the decree; or that the said return or certificate might be varied as the Court should think fit.

The substance of the affidavits, which were read in support of the motion, were as follows:—that the late defendant *Johnson* had been in the tenure or occupation of the *George Inn* for forty years previous to his death; and that, since his death, the inn had been occupied by the

defendant, his son. That *Johnson*, the father, had from time to time laid out considerable sums of money upon the inn and premises; that he had also built near it, upon his own freehold land, an hotel which contained only sitting and sleeping apartments, and was not adapted for an inn, except in connexion with the *George Inn*; and that, being an extensive coach proprietor, he had also built near the inn, upon his own freehold land, stables for fifty horses. That the defendant *Johnson*, the son, had also purchased a laundry, and a lodging-house for servants, for the use of the inn, which were comparatively of small value if unconnected with the inn. That the foregoing facts were stated to the commissioners by the defendants' solicitors, and were urged as a ground for awarding Lot 1 to their clients. That it was at the same time represented to the commissioners, that if *Johnson* were turned out of the *George Inn*, the consequences to him would be most serious, and that he would be placed in a situation of having money extorted from him by other parties, for the sake of being reinstated in his present occupation; and that, nevertheless, the four commissioners chosen by the plaintiffs, refused to make the required allotment: one of them alleging, that, in doing so, they should act partially towards *Johnson*. That the plaintiff *Story*, who was present, proposed to have the lots disposed of by ballot, which was approved of by the four commissioners, but objected to by the others. That, as the ballot was objected to on the part of the defendants, *Story* then insisted upon having Lot 1, which was accordingly awarded to him by the four commissioners, the others dissenting from this allotment. That, during the whole of the proceedings, *Story* interfered in person, both on account of himself and *W. S. Jones*, and that the same solicitor acted for both of them.

The four commissioners, by their affidavits, did not deny in substance any of the foregoing facts, but alleged as a reason for awarding Lot 1 to *Story*, that he was en-

1835.

STORY
v.
JOHNSON.

-35-

which is an entire one third of the whole estate; that the defendants, on the other hand, were entitled only to one third amongst them; and that the *George Inn* being a fragment of an indivisible nature, the allotment of it to one or more persons would have led to much litigation, and would have given one defendant an opportunity of making an excessive demand on the other, for his individual share. They stated that they had valued the *George Inn* without reference to the adjoining hotel, and that they had omitted to take into their consideration any value of the premises, conceiving themselves authorised to do so by the decree.

They further stated, that the ballot was first proposed by one of the plaintiffs, to which they immediately assented; but that, upon its being objected to, the same solicitor proposed that Lot 1 should be awarded to *W. S. Jones*, and that *Stary* observed that it might as well be allotted to him. They added many strong asseverations as to the impartiality of their motives and conduct.

Mr. Simpsonson, Mr. Ching, and Mr. Bickner, for the plaintiff.—*Johnson* had no interest whatever in Lot 3, and the commissioners thought it consistent with justice to enable him to take that lot instead of Lot 1, in which he had an interest, and upon which he had expended large sums of money. They appear to have thought it necessary to divide the lands into shares of equal value. It was, however, necessary to adopt that mode of division, in other respects, it be inconvenient. In such cases it is the practice to divide the land unequally; and the party taking the lesser share receives a rent or some other consideration by way of owelty of partition. Having, however, chosen to divide the estate into three shares of equal value, they were in the next place bound to consider the situation of the parties. [The *Lord Chief Baron*.—The lots were equal in value, laying aside the hotel, it

1835.

STORY
v.
JOHNSON.

follows as a matter of justice, that they should allot the inn to *Johnson*. They seem to have said, if we give the inn to *Johnson*, it will be of more value to him than to the others; therefore, to make it equal to all, we will allot it otherwise. Whether that is a sound argument or not, is the question. In inclosure acts, the commissioners are directed to make the allotments as convenient as they can to the proprietors of the old lands.] They allege that if they had given Lot 1 to *Johnson* and the other defendants, it might have led to litigation; but the other defendants, including *Gardner's* representatives, concur in the arrangement. Then they say they have not regarded the leases; but they were bound to do so, or else the direction in the decree, relative to the production of deeds before them, is useless.

Mr. Temple and *Mr. Phillimore, contrd.*—This is an application to the Court against an officer of the Court, chosen by the parties themselves. [The *Lord Chief Baron*.—Omitting all other considerations, except the fact that *Johnson* had a freehold property contiguous to the *George Inn* which gave it in his hands additional value, suppose, on the partition of the estate, the commissioners thought fit to allot to him that part which was farthest from his property, and therefore most inconvenient to him; would that be a case, though the allotments might be of equal value *inter se*, in which they had executed a sound discretion? Is there any authority to shew that the Court would not interfere in such a case?] Where an inconvenient allotment only is made, the Court will not interfere. But the bill prays nothing, and states nothing with regard to the particular interest of *Johnson*; and the commissioners could not look to his rights in particular. They were bound only to look at *Johnson's* and *Gardner's* rights jointly; not to attend to all the subordinate interests comprised in that one third. Two of the parties interested in it are married women, who cannot compromise

1835.

STORY
v.
JOHNSON.

their rights. They are entitled to have an estate allotted to them, which shall be capable of a further division between them. The commissioners were bound to attend to that, but they had no power to determine *Johnson's* legal rights. His right of occupation in the inn is matter of great doubt. It will be a matter to be decided at law, or when he comes here to have his lease confirmed. The decree does not declare the lease to be binding, by reason of the confirmations of *Edward* and *Richard Jones*; on the other hand, it declares it not to be binding as regards *William Standard Jones*. Then, as the validity of the lease is not determined by the decree, and as the commissioners could not go out of the decree, was there anything calling upon them to allot a particular part of the property to a particular individual? [The Lord Chief Baron.—I should say that in justice there was.] Upon that principle *Story* might claim an equal advantage with *Johnson*, as he might sell it at a profit. [The Lord Chief Baron.—That would be to raise the value of one man's interest and to depreciate that of another, under colour of equally dividing the estate. The proper mode is to consider what would be the value, if the estate were put up to auction, and the parties interested were not allowed to buy. That being done, the commissioners ought to look to the circumstances of the parties.] Admitting that the commissioners have erred in the last respect, that is not a ground for the interference of the Court. The commissioners are arbitrators chosen by the parties to adjust their respective claims; *Jones v. Totty* (a); and the Court will never interfere with their judgment, except in cases of clear improper motive, or clear miscalculation in point of valuation. A contrary course of practice would lead to innumerable cases, arising out of alleged miscarriages on the part of the commissioners. In *Manners v. Charlesworth* (b), Lord

(a) 1 Sim. 136.

(b) 1 Myl. & K. 330.

1835.

 STORY
 v.
 JOHNSON.

Brougham took great pains to consider the duties and powers of commissioners of partition, and in that case his Lordship refused to interfere, though partiality was alleged against the commissioners. [The *Lord Chief Baron*.—I dare say I should agree with that decision, if the facts of the case were before me. I agree generally with the law as there laid down, except as to one point regarding the non-interference of the Court upon mere evidence of inequality. Surely there may be inequality so gross as to authorize the Court to interfere.] There is great difficulty as to the manner of interference. The only mode that can be suggested is to send back the return with a special direction founded on affidavits. But that is contrary to all practice. There is no instance of a special direction on a commission of partition.

Mr. *Simpkinson*, in reply.—No doubt there must be a strong case to induce the Court to quash the return of commissioners of partition. Not that they are strictly arbitrators. They are officers of the Court, though in part chosen by the parties. This is a strong case; the circumstance that two or three cottages, which were in *Gardner's* occupation, have been thrown into Lot 1, is not a reason for depriving *Johnson* altogether of the inn which he had so long occupied, and which formed the other part of that lot. Though bound by the terms of the commission to make a fair, impartial, and just division, they awarded to this person property in which he never had an interest. Such an adjudication cannot be sustained. The Court will not delegate its power of judging to commissioners of partition, any more than it will to the Master. It is said, that there is no case where the Court will interfere with commissioners of partition on the ground of mistake alone; but in *Dacre v. Gorges* (a) the Court interfered, not

(a) 2 S. & S. 454.

1835.

STORY
v.
MASON.

merely after the return, but after the matter had been apparently settled. [Mr. Temple.—There the commissioners had miscarried altogether, by including in their return an estate over which they had no jurisdiction].

THE LORD CHIEF BARON.—I do not propose in this case to go into the history of the jurisdiction of Courts of equity, for the purpose of shewing that they have power to correct the errors of commissioners appointed under their authority. That would be a useless parade. The powers of the Courts in this respect are understood by every lawyer. The only question upon which I had any anxiety was, whether or no any case had so modified the principles on which Courts of equity act in matters of this nature, as to fetter my hand. It appears to me that no argument has been used, and no authority shewn, to prevent the Court from interfering, in cases when interference becomes necessary. The question then is, whether or no interference is necessary in this case.

It is admitted on all sides, that in a case of partial judgment on the part of the commissioners, there will be ground for the interference of the Court; and it is, I think, but feebly contested, that in a case of very erroneous judgment, leading to a very unjust conclusion, the Court will have the same jurisdiction. I see no reason why it should not be so. I see no reason why, when commissioners have made a grievous error in judgment, which would make the whole decree vicious, the Court has not the same right to correct their proceedings as to interfere with the Master's report. I have been turning in my own mind, in what light to place the conduct of the commissioners; and I must say, as I am put to state my sentiments on the subject, that I am far from thinking the case free from a strong suspicion of partiality. Supposing that the commissioners had power to look at the situation of the parties, for the purpose of determining to whom they

1835.

STORY
v.
JOHNSON.

should make the respective allotments, the question is, whether they assign a just reason for not exercising that power. For clearly they have not exercised it, in refusing to listen to the reasons urged for allotting to *Johnson* that share of the property which was contiguous to that which he had purchased. What is the state of the case? It is admitted on all sides, that the division without reference to external circumstances was fairly made; that if put up to auction, without taking into consideration any adjacent property, the lots were of equal value: upon that, all are agreed. Then it is a very remarkable circumstance, if this were a matter of perfect indifference to those who had no property belonging to them adjacent to this property, that the only person to whom the possession of a particular part of the property might be important, and the only person who presses to have a choice of the lots, is refused that choice. If it were a matter of indifference to *Story* and *W. S. Jones*, why did not the commissioners say to *Johnson*, since it is of no consequence to the others, we give it to you? They do not do that; but I find that the attorney of *Story* and *W. S. Jones* is the person to propose to give it to *W. S. Jones*. Then why was it not given to *W. S. Jones*? It is impossible to avoid the suspicion, that *Story* and *W. S. Jones* were swimming in one boat, guided by one man at the helm, who was their solicitor. It is true that they proposed the ballot, but it was safe enough to propose the ballot when it was known that it would be objected to. It appears to me, therefore, under these circumstances, when the fact is considered that the four commissioners in *Story's* interest concurred in the award in question against the opinion of the other two, that the Court ought to interfere. I do not say that the Court would interfere merely because the four were opposed to the two, if that stood alone; but I say, that if one of those two had happened to have been chosen on the one side, and the other on the other side, it would have altered my

1835.
STORY
v.
JOHNSON.

impression as to the partiality of the commissioners. It has by no means been pressed upon the Court more than it ought, that they did not act with impartiality.

As to the oaths which the commissioners have taken of the fairness of their intentions, I hold them unworthy of consideration: a man must be base and wicked indeed, if he means to act partially in the execution of a trust. I do not, therefore, regard their affidavits on this point. Their swearing to their own virtues is nothing. The facts alone must determine the judgment of a Court of equity. Looking at the facts of this case, by an extraordinary accident, the commissioners appointed by *Story*, because appointed by his solicitor, have given him one of these lots in a case in which he is stated to be indifferent, but in which another party was not indifferent. The test of his indifference is found in the further proceedings. If he were really so, why has he put the parties to the expense of this litigation, instead of offering to exchange the lots? I cannot entertain a doubt that *Story* had a strong interest to possess this lot, I do not say as of intrinsically more value than any other lot, but as of some peculiar value to himself; and that peculiar value might consist in making a better bargain with *Johnson*. I should say, therefore, if I had to decide the question finally, that I was not satisfied, but much dissatisfied, with the judgment of the commissioners; even assuming that each portion in the division was of perfectly equal value. I see no reason why they should not have assigned to *Johnson's* representatives, that portion of the property, which they, with the consent of *Gardner's* representatives, desired to possess. I think, therefore, that this commission cannot stand.

Ordered that a commission do issue directed to new commissioners upon the terms of the original decree, with this addition, that they be approved of by the Master.

1835.

DE BEAUFORT v. ARCHDEACON.

Nov. 23rd.

UNDER the will of *William Archdeacon*, his widow, *Rosalie Archdeacon*, was entitled to the interest of certain stock for her life; and, upon her death, which occurred some years since, the testator's daughter, *Rosalie*, the wife of *Henry de Beaufort*, became entitled to the principal.

In 1803 a bill was filed by Mr. and Mrs. *De Beaufort*, and *Rosalie Archdeacon*, against *Peter Archdeacon*, the executor of the testator, and against the Bank of *England*, praying the usual accounts; and for an injunction to restrain the transfer of certain stock.

The cause came on for hearing in *November*, 1805, when a decree was made, by which it was referred to the Deputy Remembrancer to take an account of the personal estate of the testator possessed by the defendant, *Peter Archdeacon*, and also an account of the testator's debts, legacies, and funeral expenses: and an injunction *nisi* was granted to restrain the Bank from permitting a transfer of a sum of 48*l.* stock, standing in the name of *Peter Archdeacon*, and admitted by him to belong to the testator's estate. By a decree, dated in *January*, 1806, the foregoing decree was made absolute.

No further proceedings were had in the cause.

Peter Archdeacon survived *Rosalie Archdeacon*, and died in 1811, intestate.

Mr. and Mrs. *De Beaufort* now presented their petition, alleging that the testator's debts and testamentary expenses had been long since paid, and all his estate administered, except the 48*l.* stock, which, with its accumulated dividends, had been carried to the account of the Commissioners of the National Debt. They also stated that the commissioners were ready to re-transfer the stock into the name of *Peter Archdeacon*, if the same

Where, by a decree made thirty years ago, an account had been directed of a testator's personal estate and of his debts and testamentary expenses, and an injunction had been granted to restrain the Bank from permitting the transfer of a small sum of stock belonging to the testator's estate, but no further proceedings had been had in the suit; the Court, upon the petition of the only party interested, dissolved the injunction, so that an immediate transfer of the stock might be made to the petitioners, without carrying the suit any further.

1835.

DE BEAUFORT
v.
ARCHDEACON.

could in such event be received by his personal representative.

The petition prayed that the Bank might be directed to permit such a re-transfer of the stock as they would have permitted in case the decrees of *November, 1806*, and *January, 1806*, had not been made.

Mr. *Wilcock*, for the petitioners, observed, that the ordinary course would have been to have obtained the Master's report, followed up by further directions, and an order for payment of the money, the Master reporting no debts due from the testator's estate. Considering, however, the small amount of the stock, the length of time (thirty years) since any proceeding had been had, and the circumstance that the petitioners were the only parties now interested, he submitted that the Court would dispense with these proceedings. If the injunction were dissolved, the personal representative of the testator would be placed in the same situation as if there were no suit; and he was willing to pay the money as the petitioners might direct.

The Court, after observing upon the special circumstances of the case, made the order as prayed.

Nov. 27th.

LEE v. OKEY.

Testator bequeathed a sum of money to his executors, upon trust, to pay the interest to his niece A. for life; and, after

her decease, to pay the principal to her son, or to any of the testator's relations, in such shares and proportions as the executors, or the survivor of them, might think fit. By a deed-poll, reciting the will, the surviving executor appointed the principal sum in certain shares to the son of A. and two nephews of the testator:—*Held*, that the appointment was valid.

JAMES LEE, Esq., by his will, bequeathed to his executors, *Thomas Okey* and *Samuel Jones Horseman*, the sum of 1600*l.*, upon trust, that they, and the survivor of them, his heirs, executors, and administrators, should, as

to 500*l.*, part thereof, pay the interest to the testator's niece, *Ann Dyke*, for her life; and, from and after her decease, pay and apply the said principal sum of 500*l.* to her son, or to any of his, the testator's, relations, and in such parts, shares, and proportions as they, the said *Okey* and *Horseman*, and the survivor of them, his heirs, executors, or administrators should think fit. The testator bequeathed the residue of his personal estate to his nephew, *Richard Lee*.

1835.

LEE
v.
OKEY.

In 1814 the present suit was instituted by *Richard Lee* against the executors, for the purpose of having the accounts of the testator's property taken, and the residuary estate ascertained. In the course of the suit an order was made that 500*l.*, part of the testator's assets, should be carried by the Accountant-General to the account of *Ann Dyke's* legacy, and invested in the funds, the dividends thereof to be paid to *Ann Dyke* during her life, with liberty for any person interested in the principal to apply to the Court touching the same at her death. The sum of 500*l.* was accordingly applied as directed by this order.

Samuel James Horseman survived his co-executor, *Thomas Okey*, and died in *November*, 1828, having, by a deed-poll, reciting the discretionary powers given him by the testator's will, directed that, after the death of *Ann Dyke*, the principal sum of 500*l.*, whereof she took the interest for her life, should be paid to the several persons and in the several parts or proportions following, that is to say, the sum of 150*l.*, part thereof, to — *Dyke*, the son of *Ann Dyke*; the sum of 175*l.*, further part thereof, to *Richard Lee*; and the sum of 175*l.*, residue thereof, to *John Taylor*, another nephew of the testator.

Ann Dyke had only one son, *Thomas Dyke*. He died in *December*, 1834, intestate and unmarried, leaving his mother his sole next of kin. She died in *July*, 1835, having appointed *William Gibbs* her executor, who both proved

1835.

LEE
v.
OKEY.

her will and procured letters of administration of the effects of *Thomas Dyke*.

A petition was now presented by *John Taylor* and *William Gibbs*, suggesting that they were respectively entitled to such proportion of the stock purchased with the 500*l.*, as the sums of 175*l.* and 150*l.* respectively bore to the whole sum of 500*l.*, and praying that their shares of the stock might be transferred to them accordingly.

Mr. *Wood*, for the petitioners.—Upon the execution of the power, the property, which was the subject of it, became vested in the three persons named in the power. One of them was the son of *Ann Dyke*, the other two were nephews and next of kin of the testator, and therefore came under the description of his “relations:” *Harding v. Glyn*(a). Although the power of appointment was to the son of *Ann Dyke*, or to any of the testator’s relations, yet it was not void for uncertainty by reason of the discretionary power vested in the trustee. A bequest to *A.* or *B.* is void; but a bequest to *A.* or *B.*, at the discretion of *C.*, is good, for he may divide it between them: *Longmore v. Brown*(b). Here, therefore, as well as in the case cited, “or” may be construed “and.”

Mr. *Wilbraham*, for *Richard Lee*, the residuary legatee, observed, that if the Court thought the power void, his client was entitled to the whole stock; but if the Court thought otherwise, he would ask for a transfer of his share of the stock under the appointment.

The LORD CHIEF BARON made the order as prayed, with the addition that *Richard Lee*, the residuary legatee, should be paid his share under the appointment.

(a) 1 Atk. 469.

(b) 7 Ves. 128.

1835.

Ex parte ONSLOW.—In the Matter of the LONDON and BIRMINGHAM RAILWAY ACT.

Nov. 27th.

UNDER the stat. 4 & 5 *Will.* 4, c. lxxxviii., for making a railway from *London* to *Southampton*, the company are empowered to contract with corporations, tenants for life, tenants in tail, and other incapacitated persons, for the purchase of lands required for the purposes of the company.

By the 53rd section it is, in substance, enacted, that the money agreed or awarded to be paid for the purchase of any lands to be taken or used by virtue of the powers or under the authority of this act, shall, if it exceed 200*l.*, be paid into the Bank of *England*, in the name of the Accountant-General of the Court of *Exchequer*, to his account, "*Ex parte* the *London and Southampton Railway Company*," there to remain till the same shall, by order of the Court, upon the petition of the party who would have been entitled to the rents and profits of the lands sold, be applied in the redemption of land-tax, or in discharge of other incumbrances on the same lands, or any lands settled therewith, or in the purchase of other lands, to be settled to the like uses to which the lands to be purchased stood settled or limited; and that, in the meantime, and until such purchase can be made, the money so paid may, by order of the Court, upon application made thereto, be invested by the Accountant-General, in his name, in the 3*l.* *per cent.* consols, or in government or real securities, the dividends thereof, in the meantime, to be paid under a like order of the Court to the party who would have been entitled to the rents.

The 56th section enacts as follows:—"That where, by reason of any disability or incapacity of any party entitled to any lands, to be taken or used, or in respect of which any compensation or satisfaction shall be payable

Where, by a railway act, it was enacted that the monies paid into Court by the company for lands purchased by them should, by order made upon the petition of the party interested, be invested in the purchase of other lands, to be settled to the like uses, and, in the meantime, should, by an order similarly obtained, be invested in the funds; and it was further enacted, that the Court might order the expenses of such purchases, and of the investment of the purchase-money in land "or other disposition of the same," to be paid by the company:—*Held*, that the company were liable to pay the expenses of the interim investment of the money in the funds.

1835.

Ex parte
ONSLOW.

under the authority of this act, the purchase-money for the same, or the money paid for such compensation or satisfaction, shall be required to be paid into the Bank of *England*, to be applied in the purchase of other lands to be settled to the like uses, in pursuance of this act, it shall be lawful for the said Court to order the reasonable expenses of all such purchases, and of the re-investment of the purchase-money in land or other disposition of the same, together with the necessary costs and charges of obtaining the proper orders for such purposes, to be paid by the said company out of the monies to be received by virtue of this act; and the said company shall, from time to time, pay such sums of money for such purposes as the said Court shall direct."

The company having purchased of Lord *Onslow* certain lands in *Surrey* of which his lordship was tenant for life, and having paid the purchase-money into the Bank in the manner directed by the 53rd section of the act, his lordship now presented his petition, praying to have the purchase-money invested in the 3l. *per cent.* consols, and to be paid the dividends as they should become due. The only question was, by whom the costs of the present application and of investing the money in the funds should be paid?

Mr. *Hayter*, for the petitioner, referred to the 56th section. [The *Lord Chief Baron*.—The question is, whether the words "or other disposition of the same," may not be read "and any disposition of the same," in which case the costs would be borne by the company.]

Mr. *Heathfield*, for the company, contended that the words "or other disposition of the same," only applied to cases where the money, instead of being invested in the purchase of other lands, was employed in the redemption of land-tax or other incumbrances; and he referred to *Es*

parte Northwick (a). He said that the proposed construction would be a great hardship on the company.

1835.

Ex parte
ONslow.

The LORD CHIEF BARON.—The 53rd section of the act directs that the money paid by the company for the purchase of lands shall, by an order of the Court made upon the petition of the party interested, be invested in other lands, to be settled to the like uses as the lands so purchased by the company; but that, in the meantime, the money may, upon a like order, be invested by the Accountant-General in the funds, and the dividends paid to the party making the application. Under that section the Court is now called upon to order an investment of the money in the funds, until it shall be employed in the purchase of lands; and the question is, whether the 56th section, relating to expenses incurred under the act, applies to this case? If it does not, the effect will be, that Lord Onslow, unless he put himself to the personal expense of investing this money in the funds, will lose the benefit of his life estate to that extent, until a proper investment in land can be found. This case, however, is not like those where the acts give no power to the Court to direct the payment of expenses, except upon an actual investment in land. This is an investment of the purchase-money in land, “or other disposition thereof;” and, by the 56th section of the act, the company may be ordered to pay the expenses of that disposition. Why, then, should the company not bear those expenses? I am not informed that any rule of practice has been established to the contrary. Therefore, as I consider this to be *res integra* on this act of Parliament, and as I think it reasonable that the company should pay those expenses, an order must be made to that effect.

Order accordingly.

(a) Ante, p. 166.

1835.

Nov. 27th.

HALL v. STORER.

Where a person is appointed guardian, under a will not duly executed for that purpose, the Court will appoint him without a reference.

ROBERT HALL, by his will, appointed his wife, *Elizabeth Hall*, to be his sole executrix and the guardian of his child or children by her, if more than one, during their minority; but, if his wife should die during the minority of any of his children, then he appointed his brother, *William Hall*, to be their guardian.

By a codicil the testator, after stating the death of his wife, requested his brother, *William Hall*, and the Rev. *W. M. Tucker*, to act as trustees for his three infant children; and, by a subsequent codicil, he appointed *William Hall* and Mr. *Tucker*, and two other persons, to be his executors.

Upon the death of the testator, in *October, 1829*, the will and codicils were proved by two of the executors, *William Hall* being one. *Tucker* and the remaining executor renounced probate. Neither the will nor the codicils were attested by two witnesses, as required by the stat. 2 Car. 2, c. 24.

John Peter Hall, one of the infant children of the testator, who had been maintained by *William Hall* since the testator's death, now presented his petition, praying a reference to the Master to settle a proper sum for maintenance for the time past and to come; and, if necessary, to approve of a proper person to be his guardian. The fortune of the petitioner consisted only of the sum of 2127*l.* consols.

Mr. *Bird*, for the petitioner, submitted that, under the circumstances, the Court would appoint *William Hall* to be guardian, without a reference to the Master. He mentioned *Chatteris v. Young* (a).

(a) 1 Jac. & W. 106.

The LORD CHIEF BARON thought it reasonable that the Court should comply with the intention of the testator, though the will did not operate as a valid appointment of a guardian. His Lordship therefore ordered that *William Hall* should be appointed guardian of the infant, without a reference to the Master for that purpose, but he directed a reference to the Master as to past and future maintenance.

1835.

HALL
v.
STORER.

ARGENT v. The BANK of ENGLAND.

Nov. 27th.

IN *June*, 1833, the plaintiff caused a *distringas* to issue out of this Court, directed to the Governor and Company of the Bank of *England*, for the purpose of restraining them from transferring a certain sum of stock, standing in the joint names of *Robert Jones* and *George Pocock*, who were trustees of that stock.

A party, who had purchased a reversionary share in certain stock, caused a *distringas* to be laid upon it, and afterwards filed a bill in *Chancery* to have his interest in the stock ascertained, alleging conflicting claims; the *distringas*, not having been followed by any suit in this Court, was discharged with costs.

No bill, pursuant to the *distringas*, was filed in this Court; but, in *Hilary* Term, 1835, the plaintiff filed his bill in the Court of *Chancery*, stating that he was the assignee, for a valuable consideration, of a reversionary share in that stock; stating, also, that a claim had been made upon the same share by *Robert Jones*, in respect of monies alleged to have been previously advanced by him to the assignor; and praying that his, the plaintiff's, interest in that stock might be ascertained and secured for his benefit.

Mr. *O. Anderdon* now moved, on the part of the trustees, that the *distringas* might be discharged with costs. He cited *Scott v. Bank of England* (a); and added, that in *Fellows v. Bank of England* (b), the plaintiffs pressed

(a) 2 Y. & J. 327.

(b) 1 Younge, 385.

1836.
 ARGENT
 v.
 The Bank of
 ENGLAND.

Lord Lyndhurst to make it a term in the order that the *distringas* should remain in force till a cause in *Chancery*, in the same matter, had been determined; but his Lordship, nevertheless, set aside the *distringas* with costs, although the plaintiffs had a good equitable case, and although the decree was ultimately made according to the equity of the bill; the simple ground of his decision being that they had not followed up their proceedings here, but had gone into another Court. It might be said, that, in this case, the parties had gone into *Chancery* upon a point entirely distinct from that which they intended to litigate here. That argument, however, could not prevail, because the Court would never interfere to restrain the transfer, except in the case of misconduct on the part of the trustees.

Mr. Teed, *contrà*.—If no attempt be made to sell the stock, what necessity is there for an application to a Court of equity for protection? The effect of a *distringas* is a protection to the *cestui que trust* against any attempt to abuse the trust. The cases in which the Court has set aside a *distringas* have been where the process has been used fraudulently or vexatiously: fraudulently, where the party applying has no interest; or vexatiously, where the object is only to gain time in order to file a bill in *Chancery*. Now here, the parties moving are mere trustees. [The Lord Chief Baron.—One of them claims an interest beneficially.] At all events the bill filed in *Chancery* is not for the purpose of carrying on the trusts, but merely to ascertain the plaintiff's interest in a particular part of the fund. That is not such a bill as would prevent the instituting a suit in this Court to administer the trust generally; and, consequently, the fact of its having been filed affords no ground for granting the present motion. As to the plaintiff's intention respecting further proceedings in this Court, his affidavit expressly

states that a bill will be filed here, if rendered necessary by the conduct of the trustees.

Mr. *Anderdon*, in reply.

The LORD CHIEF BARON.—I have no hesitation in discharging this *distringas*. It appears to me, that the party who has obtained it had no right to file an ineffectual bill of this sort. He does not state that he had no notice of *Robert Jones's* claim till after he had filed his bill. If he had notice before he filed his bill, he had no right to issue the *distringas*.

Distringas discharged with costs.

HIS MAJESTY'S ATTORNEY-GENERAL and the COMMISSIONERS OF WOODS AND FORESTS—Plaintiffs;

SIR GEORGE SITWELL, BART.—Defendant.

Dec. 3, 4, 5.

BY the stat. 57 Geo. 3, c. 97, (which has since been repealed), the Commissioners of His Majesty's Woods and Forests were empowered to purchase lands on behalf of

The Commissioners of Woods and Forests, having power, under the stat. 57 Geo. 3, c. 97, to make sale of

any royalties, honours, hundreds, manors, lordships, or franchises, "or any rights, members, or appurtenances thereof," belonging to the Crown, within the ordering and survey of the *Exchequer*, contracted for the sale of the crown manor of *E.*, and all courts baron, courts leet, and all fines, reliefs, rents, profits, waifs, strays, deodands, and "all other rights, members, emoluments, and appurtenances thereunto belonging:"—*Held*, that, this being in effect a contract for sale by the Crown, the advowson of *E.*, which was appendant to the manor, did not pass under the contract, and, consequently, that the purchaser was bound to take a conveyance of the manor without the advowson.

Seemle, that if the contract had been between subject and subject, the advowson would have passed; although, at the time of the contract, it was not known by either party to be appendant to the manor, and therefore the sale of it was not in their contemplation.

Where a contract is entered into for the sale of an estate, and, under the general words, property passes, which the vendor insists he did not mean to sell, but the purchaser by his answer denies or does not admit that it was not in his contemplation at the time of the purchase; *seemle*, that the vendor cannot sustain a bill against the purchaser to have the contract rectified, on the ground of mistake, and carried into execution.

Quare, whether, consistently with the Statute of Frauds, the Court can entertain a bill for rectifying an executory contract for the sale of lands, and carrying it, when rectified, into execution, even where the mistake is admitted by the answer.

Under the statutes 57 Geo. 3, c. 97, and 10 Geo. 4, c. 50, the issuing of a special warrant from the Treasury to the Commissioners of Woods and Forests is not a condition precedent to the making of any contract between the commissioners and the purchasers of crown lands; it is sufficient if a special warrant be obtained before certificates of sale are granted to the purchaser.

1835.

ATT.-GEN.

v.

SITWELL.

the Crown, lying adjacent to the royal forests, or to other extensive properties of the Crown.

In order to provide a fund for the payment of the purchase-monies for such estates, the commissioners were, by the fourth section of the act, authorized and empowered from time to time to contract for the sale, and absolutely to make sale of any part or parts of the possessions or land revenues of the Crown within the ordering and survey of the *Exchequer* in *England*, which should consist of any royalties, honours, hundreds, manors, lordships, or franchises, or any rights, members, or appurtenances thereof, or thereto belonging or appertaining, or any fines, issues, amerciaments, profits, dues, or monies arising therefrom, or incident to, or receivable in respect thereof; or any messuages, lands, tithes, rents, mines, minerals, collieries, woods, wood grounds, fens, marshes, waste lands, or any other tenements or hereditaments whatsoever, or any other revenues belonging to the Crown, within the ordering and survey aforesaid, which should, in their judgment, be desirable to be sold, for the best prices or considerations in money which the Commissioners for the time being of His Majesty's Woods and Forests should, under the direction and with the approbation of the Lord High Treasurer or Commissioners of the Treasury for the time being, or any three or more of them, be able to procure for the same.

By the fifth section of the act it was enacted, that no contract for the purchase or sale of any estate or estates should be made under the authority of this act, unless by special warrant to be issued for that purpose by the Lord High Treasurer or the Commissioners of the Treasury, or any three or more of them for the time being.

By the sixth section it was enacted, that, whenever the commissioners should have entered into any contract for the sale of any of the crown property thereby authorized to be sold, they should grant to the purchaser or pur-

chasers a certificate, describing the premises to be sold, and the amount of the purchase-money; which certificate, upon payment of the purchase-money within thirty-one days after its date, was to be signed or indorsed with a receipt by the cashier of the Bank of *England*, and was to be enrolled in manner directed by the act. And it was further enacted, that, from and after such enrolment, the respective purchasers, their heirs or successors, should be adjudged and taken to be in the actual seisin and possession of the premises purchased, and should hold and enjoy the same peaceably and quietly, freed and discharged from all claims and demands of his Majesty, his heirs and successors, or of any person or persons claiming under him or them, as fully and amply to all intents and purposes as his Majesty, his heirs and successors, might or could have held and enjoyed the same, if such sale had not taken place.

The eighth section enacted, that whenever any of such possessions or land revenues of the Crown should be sold by the Commissioners of His Majesty's Woods and Forests, under the authority of this act, with the approbation and under the authority of a warrant from the Commissioners of the Treasury issued for that purpose, the purchaser or purchasers thereof should not be bound or required to make any further inquiry whether the same were saleable under the authority of the act, or into the powers of the commissioners in making such sale; but every such purchaser or purchasers having ascertained the same to have been sold under the authority of a warrant, and having obtained such certificate, and paid the purchase-money, and procured the receipt of the cashiers of the Bank of *England*, and having enrolled the certificate and receipt, should hold the premises so purchased, and should have free, quiet, and peaceable possession thereof, and should not be liable to be thereafter disturbed under any pretences whatsoever.

1835.

ATT.-GEN.

v.

SITWELL.

1835.
 ATT.-GEN.
 v.
 SITWELL.

In pursuance of this act, the Commissioners of Woods and Forests, in *May*, 1828, caused the manor of *Eckington*, in the county of *Derby*, together with divers lands and tenements situate at *Eckington*, belonging to the Crown, to be put up to public sale in 96 lots. The commissioners, however, omitted to obtain a special warrant from the Treasury previous to the sale, as required by the fifth section of the act. The warrant obtained by them for the purposes of this sale was not dated till the 16th of *August* following. The auction took place, but part only of the lots were sold; and the defendant, being desirous of purchasing by private contract several of the lots which remained unsold, a written memorandum of the contract for such purpose was drawn up, dated the 10th of *June*, 1828, and signed by Messrs. *Drivers* on the part of the commissioners, and by Mr. *Humble* on the part of the defendant. The general purport of the contract was, that the defendant agreed to purchase seven specified lots of the above estate, as described in the printed particulars of sale used at the auction, at the price of 34,000*l.*, subject, with some few exceptions, to the printed conditions of sale used at the auction; that he was to pay 1000*l.* by way of deposit, and the purchase-money by instalments. The first instalment, 10,000*l.*, to be paid on the 29th of *September* following, and the remainder of the purchase-money in *April*, 1829. Upon failure of payment of the first instalment at the time specified, interest to be paid on the whole purchase-money at the rate of 5*l.* per cent.

One of the lots, upon which the main question in this cause depended, was described in the particulars of sale as "the valuable manor of *Eckington*, extending over about 6900 acres, of which about 3000 acres are copyhold, with numerous messuages and homesteads held of the said manor, subject to the payment of a fixed fine, upon alienation, of 6*d.* for each acre, or for any portion

less than an acre, and the like sum for each messuage or scite; the quit or chief rents payable to the manor, amounting to 43*l.* 2*s.* 7*d.* a year; and all courts baron, courts leet, and all fines, reliefs, rents, profits, waifs, strays, deodands, and all other rights, members, emoluments, and appurtenances whatsoever thereunto belonging, except the coals and minerals under lot 1, &c."

The ninth condition was, that if any mistake were made in the description of the premises, or any other error whatsoever should appear in the particulars of the estate, excepting as regarded the quantities or boundaries thereafter provided for, such error or mistake should not annul the sale, but a compensation or equivalent should be given or taken, as the case might require.

When the above contract was entered into, it was not known either to the commissioners or the defendant that the advowson of *Eckington* was appendant or appurtenant to the manor of *Eckington*. The King had, from time to time, exercised the right of presentation; but the advowson, being considered an advowson in gross, was not deemed by either party to be included in the contract.

After the contract had been signed and the defendant let into possession, but before the purchase-money had been paid, it was ascertained that the advowson in question was appendant to the manor of *Eckington*, and the defendant refused to complete his purchase unless the advowson were conveyed to him with the rest of the property; contending that the manor in all its integrity was included in the contract. The present information and bill was therefore filed, praying for a specific performance of the agreement, a declaration that the defendant was not entitled to have the advowson conveyed to him with the manor, and that he might be decreed to accept a conveyance of the manor without the advowson, or with an exception of the advowson.

1835.

ATT.-GEN.

v.

SITWELL.

1836.

ATT.-GEN.
v.
SITWELL.

The defendant by his answer made various objections to the relief prayed; but he principally contended, *first*, that, at the time of the contract, the commissioners had not any special warrant or authority from the Lords Commissioners of the Treasury for making sale; *secondly*, that he was entitled to have the advowson conveyed to him, or to be released from the contract altogether. With respect to the latter point, he admitted that he agreed to purchase the manor without any reference whatever to the advowson, and without knowing or believing that the advowson formed part thereof. That, at the time of the contract, the existence of the advowson was not present to his mind; and that, had he known that the advowson was to pass with the manor, he would have offered a larger price for the lot in which it was included. He submitted, however, that, under the circumstances, if the contract were enforced against him, it ought to be deemed to include the advowson.

The *Solicitor-General*, and Mr. *Reynolds*, for the plaintiffs.—The defendant admits that, when the contract was made, the advowson never entered into his imagination. He now objects, *first*, that the commissioners had no authority to sell; and, *secondly*, that, if they had authority, they cannot make a good title. His first objection is founded on the circumstance that the warrant which they received from the Lords of the Treasury was signed on a day subsequent to the contract. Perhaps, in strictness, the act requires that the warrant should be signed in the first instance. But the act must receive a rational construction. Why should it be so construed as to render it impossible that any proceeding should take place under it? The practice is for the commissioners to negotiate generally, and, as any particular contract is entered into, they receive a warrant from the Treasury. The purchaser has, in fact, nothing to do with the arrangement. It is a

matter entirely between the Treasury and the Board of Woods and Forests. The object of the act was, that the purchaser should be involved in no question over which he had no control. The sixth section points out the course to be pursued by the purchaser; the last words of that section are sufficient to give him a good title to the property as against the Crown; and, if so, there is no other party who can object to the title.

Then, supposing this objection to have been answered, the main question is, whether the plaintiffs are entitled to force the defendant to take the manor with the exception of the advowson. That depends on two questions: one as between subject and subject, the other as between the Crown and a subject. Even if the question were between subject and subject, it is clear, both upon principle and authority, that the plaintiff would be so entitled. It is possible that the defendant may say—admitting, for the purpose of the argument, that you, the plaintiff, did not mean to sell, that might be a reason, if I were seeking specific performance of the agreement at your hands, for the Court not to interfere; but it is a different proposition to say that the Court at your instance will compel me to take the manor without the advowson. Now, that argument cannot stand. The Court will so compel him. The plain reason for that is, that he has agreed to purchase what the plaintiffs meant to sell, namely, the manor without the advowson; and, if anything has been signed contrary to that meaning, the Court will say that it has been signed by mistake. The Court can rectify mere mistake: it can, therefore, rectify an agreement made in language which did not express the meaning of the parties. Here it is clear that the advowson was not intended to be sold. Suppose, instead of the present bill, the plaintiff had filed a bill to have the memorandum of the 10th of *June* rectified, so as to shew the actual intention of the parties better than it does at present. Good sense would suggest that such a bill might

1835.

ATT.-GEN.

v.

SITWELL.

1836.

ATT.-GEN.

v.

SITWELL.

be filed; and good sense in this instance is borne out by the authorities. In *The Marquess of Townshend v. Stangroom* (a), it appeared that *Stangroom* was tenant of Lord *Townshend* from year to year, and a negotiation was entered into with him that he should become tenant for a term of years, and, for that purpose, a written agreement was entered into, which stated the farm to be "in the occupation of *Christopher Stangroom*," and the land to consist of 425 acres more or less. Now, in fact, the farm in his occupation contained more than 425 acres, but it had been contemplated to take away from it a certain number of acres, and to give *Stangroom* a portion of another farm. Lord *Townshend*, therefore, refused to demise to him more than 425 acres, and filed his bill against him to compel the performance of that agreement. *Stangroom*, on the other hand, filed his cross bill to compel the performance of the contract, giving him the whole. This being the state of facts, the question was, whether parol evidence could be admitted to shew what was the real contract. Lord *Eldon* finally determined that he could give relief to no party; but, in the course of his judgment, he said:—"I will not say that, upon the evidence without the answer, I should not have had so much doubt whether I ought not to rectify the agreement as to take more time to consider whether the bill should be dismissed; but the evidence must be taken, due regard being had to the answer." Lord *Eldon*, therefore, in effect said, that, if the defendant had not so positively denied the agreement, as varied, he would at least have considered whether he would not have listened to evidence on the subject. Lord *Eldon*, in his judgment, took great notice of the case of *Rich v. Jackson* (b). The question there originally came on in a Court of law, where it was held that you could not go out of the written agreement. The result at law was

(a) 6 Ves. 328.

(b) 4 Bro. C. C. 514; 6 Ves. 334, n.

the result in equity; but why? Because in the teeth of the answer, denying any other agreement; and, with impeachable evidence, the Court would not interfere against the legal rights of the party insisting on that agreement. It may be conceded, that, to enable the Court to interfere on the ground of mistake, there must be evidence that shall leave no doubt; but here there is the strongest possible evidence—the admission of the defendant. In *Lord Irnham v. Child* (a), Lord *Thurlow* said, “Suppose it was a very clear thing that one agreement was intended, and that by accident it was extended further—but there is no such case in the books. If admitted to be a mistake, the Court would not overturn the rule of equity by varying the deed, but it would be an equity *dehors* the deed.” The principle, therefore, is clear, that, if the mistake is distinctly made out, and, *à fortiori*, if admitted, the Court has jurisdiction to correct it. [*Alderson*, B.—There might be some difficulty in that, under the Statute of Frauds.] Where both parties are agreed that there is a mistake, they are not within the statute. Lord *Thurlow*, however, said that cases of fraud and mistake in agreements must always clash with the statute; and it is clear that he was of opinion that the Court might relieve upon evidence of mistake, even though not admitted by the defendant. Then, upon the Statute of Frauds, there can be no difference between enforcing a contract as rectified, and rectifying what has been done upon it afterwards. There is authority to this effect, that, if a party conveying an estate include in the conveyance something which can be proved not to have been the intention of the parties to include, the Court will set that right, and make the parties re-convey: *Thomas v. Davis* (b), *Sug. V. & P. c. 3, s. 4*. There is no distinction in principle between cases of that nature and the present. If that be so, how can the defendant

1835.

ATT.-GEN.

v.

SITWELL.

(a) 1 Bro. C. C. 92.

(b) 1 Dick. 301.

1835.
 ATT. GEN.
 v.
 SITWELL.

say, give me the land, because, though a Court of equity has means enough to compel me to return it, yet it cannot prevent my having it in the first instance? The principle is that a Court of equity will not reform an agreement, unless it also carry it into execution: *Cock v. Richards* (a). Here there are grounds to reform the agreement, and the execution of it is a necessary consequence.

Upon the subject of reforming written instruments in equity by the admission of parol evidence of mistake, there are many authorities in favour of the plaintiff: *Henkle v. Royal Exchange Assurance Company* (b), *Calverley v. Williams* (c), *Ball v. Storie* (d), *Young v. Young* (e). Here it is very clear that, by the word manor, the parties must have meant the manor without the advowson. They must have known that the Commissioners of Woods and Forests were selling under the act alone. We do not say that there are not words in the act which might, under circumstances, include the advowson, but it is at least doubtful what the commissioners were authorized to sell. The act says, "any part of the possessions or land revenues of the Crown within the ordering and survey of the *Exchequer*." That must mean productive revenues; and it is observable that the various things which are afterwards enumerated all point distinctly to matters of revenue and profit. It may be admitted that, under the word "hereditaments," an advowson, if it otherwise come within the scope of the act, may be included; but, looking at the sort of property, the sale of which was contemplated, can any one help doubting whether it was ever meant to be included? And, if so, can it be said that the parties meant to include the advowson in the contract?

This brings us to the consideration of the question as

(a) 10 Ves. 441.

(b) 1 Ves. sen. 317.

(c) 1 Ves. 210.

(d) 1 S. & S. 210.

(e) 1 Dick. 295, cited.

between the Crown and the subject. Upon a grant from the Crown itself of the manor, though with the appurtenances, the advowson would not pass: *Stat. De Prerogativa Regis* (a); *Bac. Abr. Prærog.* (F) 2.; *Hargr. Co. Litt.* 121. b., note 2. It will be said that this is a mere statutory conveyance by commissioners; and that, on the authority of *Doe d. Watts v. Morris* (b), prerogative rights have no application here. That case, however, is distinguishable from the present. There certain parties had been in possession of an encroachment on a crown manor for more than twenty-three years. The manor was afterwards conveyed by the Commissioners of Woods and Forests to a purchaser under the 57 Geo. 3, c. 97. The purchaser brought ejectment for the encroachment, and it was contended on his behalf, that, as the Crown could assign a chose in action, it could also assign a right of entry; and, consequently, that the commissioners, when they sold the manor, must be considered as having assigned the right of entry with the manor. The Court, however, were of opinion, first, that the right of entry did not pass under the conveyance, and, secondly, that the prerogative law did not apply, because, under the statute, the commissioners could not take or dispose of any interest not in possession. The result of that decision only was, that the right of entry in such cases remains in the Crown. Here prerogative law is applicable; for, inasmuch as by that law, a manor does not include an advowson appendant, it follows that the 57 Geo. 3, c. 97, authorizing the sale of manors by the commissioners, does not authorize the sale of advowsons. The framers of the statute must have meant to use words in the manner in which they are generally intended as between the Crown and a subject. It cannot be said that the manor passes under the general

1835.

ATT.-GEN.

v.

SITWELL.

(a) 17 Ed. 2, stat. 1, c. 15.

(b) 2 Bing. N. C. 189.

1835.
 {
 ATT.-GEN.
 v.
 SITWELL.

words of the statute; *Archbishop of Canterbury's case* (a); nor can the King be deceived in his grant, or supposed to have granted what he has not assented to. Besides, it is worthy of remark that the Judges in *Doe d. Watts v. Morris* considered the statute 57 Geo. 3, c. 97, as explained by the subsequent statute of 10 Geo. 4, c. 50. Now the latter statute expressly excludes advowsons from its operation, and, by the third section, empowers the commissioners to complete, under its provisions, any contract commenced previously to its enactment. Here the contract was commenced under a former act, and was in *feri* when this act passed.

Lastly, the defendant must be considered as having waived all objections under the act of Parliament. Soon after he took possession a proper certificate of purchase was sent to him, which he returned on the 4th of October, 1828. From that time he has been in possession of the conveyance and of the act of Parliament, and several letters have passed as to the form of the conveyance. He continued for a long time in possession, without stating any objection or any reason why he did not complete the conveyance, and he sent no written objections till January, 1830. Not having objected earlier he must be compelled to take the title at all hazards: *Colton v. Wilson* (b), *Fleetwood v. Green* (c). [Alderson, B.—It was not shewn in *Colton v. Wilson* that the heir could have resisted the contract. I should have thought the acceptance of an abstract only waives objections in the abstract.] A party may by his acts waive his right to take any title whatever: *Margravine of Anspach v. Noel* (d). After delay, a vendor is not bound to give the purchaser a better title than that of which he has given him notice. [Alderson, B.—Suppose it comes out that the title is bad, you cannot make

(a) 2 Rep. 46 a, 1st. Resol.

(b) 3 P. W. 190.

(c) 15 Ves. 594.

(d) 1 Madd. 310.

him take the title. Is there any case which goes so far as to shew that, where a defendant, by affirmative evidence, proves the title absolutely bad, the contract is nevertheless enforced? In *Shepherd v. Keatley* (a), the Court of *Exchequer* differed from the Court of *King's Bench* upon a point of that nature.] At all events the defendant would have as much notice of a public act of Parliament as if it were in the abstract.

1835.

ATT.-GEN.

v.

SITWELL.

Mr. Boteler, Mr. Wigram, and Mr. Lowndes, for the defendants.—The stat. 57 Geo. 3, c. 97, was intended to give to the Lords of the Treasury, and not to the Commissioners of Woods and Forests, the discretion of choosing the estates which were to be sold under the provisions of the act. It was necessary, therefore, to have the sanction of the former by their formal warrant, and no certificate of contract, as provided under the sixth section, could be good, unless the warrant had previously issued. Now it was of the utmost importance to the purchaser that the certificate should be good. A very large sum of money was at stake. The 10 Geo. 4, c. 50, has so far relaxed the provisions of the former act, that in small purchases, under 100*l.*, the purchase-money may be paid at once to the commissioners. Here the first instalment of purchase-money amounted to no less a sum than 10,000*l.*; and no money could be paid, nor could any estate vest in the purchaser without the certificate. The only authority which the cashier of the Bank would have had to receive the money would have been the certificate. Suppose the money had been paid into the Bank without a certificate, and lost, the purchaser would have been the sufferer. The Court, therefore, will not suffer any deviation from the act without looking to the safety of the public. It is not a mere case between party and party. A loose mode

(a) 1 C. M. & R. 117; 4 Tyr. 571.

1835.

ATT.-GEN.
v.
SITWELL.

of proceeding under the act will be attended with the most serious consequences. The estate agreed to be purchased in these cases is, legally speaking, in the same situation as an estate agreed to be purchased under a power, in which case every circumstance required by the power must be strictly attended to and literally performed: *Sugd. Powers*, p. 214, 5th ed. Here, in the same manner, if the express conditions of the act have not been complied with, the vendor can give no good title. What are the conditions? That the warrant should precede the contract. The general purport of the fifth section of the statute, as well as the words "issued for that purpose," are clear upon this point; and, if any aid is to be gathered from the late act of 10 Geo. 4, c. 50, the word "previously," in the 60th section, is conclusive. Then, under these circumstances, can the purchaser be compelled to take a doubtful title? It was said that the Court would give a reasonable construction to the act. If a case were to arise in which the Court being called on to construe a statute, should find that it had reference to a pre-existing state of things; and that certain words in it, although they might bear a construction which would destroy the intention of the legislature, might yet bear a different construction—it is not to be said that the latter construction might not be given. But here the state of circumstances arises solely from the act of Parliament, and not from any thing existing prior to the act. There is a class of cases, in which a bond, which is joint at law, has been held to be joint and several in equity; but in *Sumner v. Powell* (a), Sir *William Grant* took this distinction; that though, where there were pre-existing circumstances authorizing such a construction, you may, in equity, construe a joint bond to be joint and several; yet, where the bond itself is the origin of the transaction, you must construe it literally in equity as well

(a) 2 Mer. 30.

as at law. The same reasoning is applicable in this case. Here the contract has arisen solely from the act of Parliament, and must depend in every respect upon a literal construction of the act. But suppose it is a reasonable construction to say that the warrant is equally available either before or after the contract, can the Court so look at the question if there be a bare possibility that the thing sold was the thing intended to be sold? It is said, that a strict construction of the act would lead to great inconvenience. Why cannot the Commissioners of Woods and Forests, upon learning that there is certain property which it might be proper to sell, apply to the Lords of the Treasury for their sanction? [*Alderson*, B.—The question is, whether the contract is not such as a special warrant will ratify. Suppose the defendant accepts the special warrant, and takes possession of the land, is not that an acceptance of the contract under the special warrant?] Upon that supposition the contract would not be complete till a special warrant had been had. The commissioners would go down into the country authorized to treat, but not to bind the vendor. The contract would only be binding on one side, which would be pernicious, for the sale is always injured where the agent has no power to bind the principal. [*Alderson*, B.—That may be the case, where the contract is between private parties, but not where the sale takes place under the Crown. This is something like the case where merchants, living in different places, contract by letter; and the last letter is the completion of the contract. *Adams v. Lindsell* (a). So here the warrant may be considered the completion of the contract. All the circumstances between the signing the contract and the ratification of it by the special warrant, may be considered as the same identical offer, and, when the warrant is obtained, the contract is finished.] The legislature intended that

1835.

ATT.-GEN.
v.
SITWELL.

(a) 1 B. & Ald. 681.

1835.

ATT.-GEN.
v.
SITWELL.

the Lords of the Treasury should be the substantial parties to contract; if it were not so, what would be the consequence in case the Commissioners of Woods and Forests made what the Treasury might deem an improvident sale? But, even assuming the warrant to be part of the contract, it is like those contracts which cannot be completed, unless *A. B.* shall approve. When a fortune is given to a person upon condition that he marry with the approbation of *A. B.*, the condition will not be fulfilled by *A. B.*'s approbation after the marriage has taken place. Here, upon the same principle, the approbation of the Treasury must be given previously, not subsequently, to the contract: 10 *Geo.* 4, c. 56, s. 60. [*Alderson*, B.—“Previous authority” there means “previous general authority.”] If there be any question on the construction of the act, your Lordship cannot compel the defendant to take this title. But the construction here is similar to that which has been put upon a clause in the Bankrupt Act. The 6 *Geo.* 4, c. 16, s. 88, enacts, that the assignees shall be indemnified for what they shall do under that section, and that no suit in equity shall be commenced by them without the consent of the major part of the creditors who shall have proved under the commission. Now, it has been argued upon that clause, that the consent of creditors might as well come after as before the institution of the suit, for that the clause was only intended as an indemnity to the assignees against the claims of creditors. That argument, however, has been overruled by many decisions: *Ocklestone v. Benson* (a), *Boxon v. Williams* (b), *King v. Tullock* (c). It is true that, in *Piercy v. Roberts* (d), Sir John Leach recanted his former opinion given in *Ocklestone v. Benson*: and, in *Jones v. Yates* (e), Sir William Alexander said that he had consulted with the Master of the Rolls and

(a) 2 S. & S. 265.

(b) 2 Y. & J. 475.

(c) 2 Sim. 469.

(d) 1 M. & K. 4.

(e) See 2 Sim. 470, n.

the present Vice-Chancellor, and they were of opinion that the decision in *Ocklestone v. Benson* was wrong. But, on the 8th. of *November*, 1833, upon the argument of a plea of this section of the statute to a bill filed by the assignees, the Vice-Chancellor observed, that he had no recollection of any conversation with Sir *William Alexander* on the subject, and he was of opinion that the decision in question was right. These conflicting decisions shew the degree of doubt which existed on that clause of the Bankrupt Act. Here the defendant's title depends on the construction of an act of Parliament, which is open to the same doubt; and that circumstance alone ought to prevent his being compelled to take this title.

Then comes the important point as regards the advowson. We contend that the words of the agreement were sufficient to carry the advowson as between subject and subject. If there were any mistake in the agreement, which we deny, the cases cited, where contracts have been rectified on the ground of mistake, are not applicable. All those contracts were executed, not executory, and the Court from necessity admitted parol evidence to explain them. It was the only way in which relief could be given. Those cases are not disputed, nor is it disputed that, upon a bill filed to enforce an executory agreement for the sale of real estate, the defendant may insist that the agreement did not express the real intention of the parties; and, by that means, he may prevent the execution of the contract. But there is no case where the Court has ever rectified such an executory agreement, and at the same time carried it into execution. The only authority which can be adduced for such a proposition are the words of Lord *Eldon*, in *The Marquess of Townshend v. Stangroom* (a); but his decision was contrary to the doctrine contended for; nor does it very clearly appear

1835.

ATT.-GEN.
v.
SITWELL.

(a) 6 Ves. 339.

1835.
 ATT.-GEN.
 v.
 SITWELL.

what his real opinion was upon that point. On the other hand, *Higginson v. Clowes* (a) is an authority to shew that the Court will not vary executory contracts for the purpose of carrying them into execution. In *Clinan v. Cooke* (b), Lord *Redesdale*, after adverting to a case (c), in which Lord *Hardwicke* was supposed to have sanctioned the doctrine now contended for, says:—"There is a prior case, *Walker v. Walker* (d), where Lord *Hardwicke* is made to say something similar; and there seems to be a floating idea in the mind of his Lordship that by possibility a case might be made in which even a plaintiff might be permitted to shew an omission in a written agreement, either by mistake or fraud. However, I can find no decision except the contrary way. The admission of such evidence as matter of defence is frequent." From these authorities it is clear that the Court will not, at the suit of the plaintiff, admit parol evidence of mistake for the purpose of rectifying executory contracts.

In the cases cited for the plaintiffs, not only were the contracts executed by deed or other written instruments, but there was clear evidence of mistake; except, indeed, in Lord *Irnham v. Child* (e), where the plaintiff asked for the insertion of a clause in the agreement, which had been omitted, not by mistake, but on purpose. The present case, however, cannot be treated as one of mistake. A species of property was included in the contract, which the parties had no particular intention either to include or to exclude. They had no intention one way or the other. Can the mere absence of intention in this respect induce a Court of equity to rescind the contract? The defendant bought the manor with all the appurtenances, be they what they might. If anything of less value had been included, he would have had the benefit of it. Then why is he not to have the benefit of every thing valuable appurtenant

(a) 15 Ves. 516; 1 Ves. & B. 524. (d) 2 Atk. 98.

(b) 1 Sch. & L. 39.

(e) 1 Bro. C. C. 92.

(c) *Joynes v. Statham*, 3 Atk. 388.

to the manor? In some cases even a crown advowson will pass under the words "rights, members, and appurtenances:" *Whistler's case* (a). Besides, here there are special exceptions of minerals. Now general words, coupled with a special exception, negative the exclusion of words which the exception does not cover. [The *Solicitor-General*.—Coals and minerals do not appertain to, but are parcel of, the manor.] If the plaintiffs intended to exclude the advowson, they have not executed their intention. They cannot successfully contend that an intention to reduce the agreement into writing is an agreement within the Statute of Frauds. [*Alderson, B.*—Supposing the statute to be out of the question by reason of the admission of the defendant on the record, cannot this Court, upon the authority of the decided cases, reform the agreement? Suppose an action were brought to enforce an agreement which ought to be in writing, and the declaration stated the agreement, but the plea took no issue upon the agreement, would the Judge direct the jury to give no damages, because the Statute of Frauds had not been complied with? I think not. Then cannot a Court of equity give the relief sought for in this case, all objections being removed by the state of the record?] No case has gone that length. In *Henkle v. Royal Exchange Assurance Company* (b), and the other authorities, the party seeking the relief had suffered injury from an agreement executed by mistake against the real intention of the parties. Here, not only is there no mistake, but the party sustains no injury, though he gains no advantage.

There are no grounds for saying that the defendant has waived his objections to the title; because his possession has been of necessity, to take care of the property.

The *Solicitor-General*, in reply.—The sixth and eighth

1835.

ATT.-GEN.
v.
SITWELL.

(a) 10 Rep. 63.

(b) 1 Ves. sen. 317.

1835.

ATT.-GEN.

v.

SITWELL.

could have parted with. But then it is said, that the defendant ought to have an opportunity of trying the question of law hereafter, and that, at present, the decree ought to be made in his favour. That is not the practice of a Court of equity. If the Court, upon the whole of the contract, sees what the intention of the parties was, no rule is more clear, than that it will adopt such a mode of carrying the contract into execution, as shall put an end to all possible questions. I agree, that no express case goes so far as to decide that the Court will rectify an agreement in favour of a plaintiff seeking specific performance of it according to the real intention of the parties. But, in the absence of any express decision to that effect, and without adverting for the present to the Statute of Frauds, if ever there was a case in which the Court might venture to come to such a conclusion, it is this—a case in which both parties admit in the most unequivocal manner what was their real intention. The statute not intervening, it is clear, upon principle, that the Court has authority in such a case to execute the manifest intention of the parties: *Henkle v. Royal Assurance Company* (a).

The difficulty, in truth, if any, arises on the statute. Does the statute, where the party admits that the written agreement was not his meaning, prevent the Court from enforcing what was his meaning? Your Lordship has adverted to the principle at law, where the defendant does not by his plea insist upon the statute. The same principle applies in equity. The defendant, if he means to take advantage of the statute, must do so by plea or answer. In some cases, where the party by his answer, though admitting the parol agreement, has insisted on the statute, the Court has refused to enforce the agreement. But here, the defendant has not raised the question by his answer, and, therefore, the statute cannot be brought

(a) 1 Ves. sen. 317.

1835.
 ATT.-GEN.
 v.
 SITWELL.

in aid to enable him to resist the performance of the contract. Besides, there is no case which discountenances the opinions of Lords *Eldon* and *Thurlow*, who both intimate that the difficulty arising from the Statute of Frauds will not stand in the way where the party admits the mistake.

It is said, indeed, that there was no mistake. If the parties so dealt with each other that the advowson was never hinted at, and never, in fact, in their contemplation, the including it in the contract was a mistake. Besides, under the statute, it is very doubtful whether the commissioners could sell an advowson in gross; and if they were not competent to sell that, they could not sell an advowson appendant without express words for that purpose. The word "appurtenances," must be taken with reference to the manor as belonging to the Crown.

The cases of *Clinan v. Cooke* (a) and *Higginson v. Clowes* (b) did not proceed on the ground of fraud or mistake, but simply on the inadmissibility of parol evidence to explain a patent ambiguity.

ALDERSON, B.—The argument upon this question having occupied several days, I have had opportunities of considering the case during the intervals which have elapsed between the arguments, and therefore it will be unnecessary for me to postpone my judgment.

This is an information filed by his Majesty's Attorney-General, and the Commissioners of Woods and Forests, praying that the defendant, Sir *George Sitwell*, may be required to perform an agreement entered into with the predecessors of the plaintiffs, on the 10th of *June*, 1828; that he may be declared not entitled to have the advowson appurtenant to the manor of *Eckington* conveyed to him with that manor; that he may be decreed to accept a conveyance of the manor without the advowson, or with the

(a) 1 Sch. & L. 39.

(b) 15 Ves. 516.

exception of the advowson; and further praying the execution of the agreement under the decree of the Court, and an account and payment of the purchase money.

The objections on the part of the defendant to the specific performance of this agreement are threefold. The first, which goes to the whole case, is—that the Commissioners of Woods and Forests had not power or authority to sell, as they have sold, to the defendant, or to make any binding contract upon him. The defendant denies that the commissioners had authority to sell under 57 *Geo. 3*, c. 97, which act, repealing all restrictions on the Crown which had prevented it from disposing of its land revenues, gave in lieu thereof power to the Commissioners of Woods and Forests to contract and agree with any person for the sale of any property within the ordering and survey of the Court of *Exchequer* in *England*, which should consist of manors, and other estates, with their rights and appurtenances. Now, under the power given by the 4th section of the act, the commissioners put up for sale by public auction, in various lots, the lands in question in this cause, consisting of a manor and other property in the county of *Derby*. These were not sold at the time, but were afterwards sold by private contract to the defendant, under the following memorandum of agreement, signed by Messrs. *Drivers* on behalf of the Crown, and by Mr. *Humble* on behalf of Sir *George Sitwell*. [His Lordship then read the memorandum].

Now it is said this contract was not a contract binding on the parties at the time of its execution, and the reason assigned is, because at that time no special warrant had been issued from the Lords of the Treasury authorizing the Commissioners to make this individual contract. That depends on the construction to be put on the 5th section of the act, which says, that no contract for the purchase or sale of any estate or estates shall be made under the authority of this act, unless by special warrant to be issued for that purpose by the Commissioners of the Treasury.

1835.

ATT.-GEN.

v.

SITWELL.

1835.
ATT.-GEN.
v.
SITWELL.

plexion; because, by the 17 *Ed. 2*, c. 15, it is distinctly provided, that the King shall not convey an advowson without express words to that effect. That being the case, it seems to me, that this must be considered as a memorandum of agreement between the Crown and a subject, and must fall under the general rule there laid down: and that there being no express words to that effect, the advowson cannot pass under a conveyance of the manor with the appurtenances. But then, it is said, why not let the agreement be executed in the terms in which it was worded? And why deprive the defendant of whatever advantage may be derived from the conveyance in those terms? The answer is, upon the whole facts of the case, that it would be unreasonable and inequitable so to do. If I had any doubt as to the intention of the parties, I should be disposed to accede to that proposition. But it seems to me perfectly clear, that neither the one party intended to sell, nor the other party to buy, the advowson in question. I am almost as certain of that fact, as if I could read the parties' minds at the present moment. The advowson was valued at 5000*l*. The manor with all the property belonging to it was sold for 4000*l*. It is too clear to admit of hesitation, that the parties could never have intended to sell that, as an annexed part, which was by itself of greater value than what was to be given for the whole. It appears, therefore, reasonable to require on the part of the defendant, that he should specifically perform the agreement; and in order to put an end to disputes in future, to declare it to be sufficient for the Crown to convey in plain language, that which it was the real meaning and intent of the parties should be conveyed.

As to the remaining objections, which apply only to matters which are the subject of compensation and allowance, it is admitted by the Crown that these must be considered by the Master.

Decree accordingly.

under the general words "with the appurtenances." There are various authorities to that effect; and I may more particularly refer to *Viner's Abridgment*, tit. *Prerog.* (C. c.) 9. This would have been clear, therefore, as between subject and subject; and in that case, the next question which would have arisen would have been—whether or not, on the ground of mistake, one party not intending to sell, and the other not intending to purchase the advowson, I could have reformed the agreement, and have directed the specific performance of it when so reformed. I confess I should have had great difficulty in holding that this could be done; because I cannot help feeling that, in the case of an executory agreement, first to reform and then to decree an execution of it would be virtually to repeal the Statute of Frauds. The only ground on which I think the case could have been put would have been that the answer contained an admission of the agreement as stated in the bill; and the parties mutually agreeing that there was a mistake, the case might have fallen within the principle of those cases at law where there is a declaration on an agreement not within the statute, and no issue taken upon the agreement by the plea; because, in such case it would seem as if the agreement of the parties being admitted by the record, the case would no longer be within the statute. I should then have taken time to consider whether, according to the dicta of many venerable judges, I should not have been authorized to reform an executory agreement for the conveyance of an estate, where it was admitted to have been the intention of both parties that a portion of the estate was not to pass. But in my present view of the question it seems to me that the Court ought not in any case, where the mistake is denied or not admitted by the answer, to admit parol evidence, and upon that evidence to reform an executory agreement.

But when this is considered as a question between the Crown and a subject, the case assumes a different com-

1935.

ATT.-GEN.
v.
SITWELL.

1835.

MABER
v.
HORBS.

that rector's books and other documents could not be proved as exhibits, where the party producing them might be questioned as to the custody from which they came. In *Barfield v. Kelly* the annuity deed was impeached by the answer. Here the defendants admit, that the deed was duly executed, but they put a particular construction upon it. If the deed itself be not impugned, it is of course to prove it as an exhibit.

ALDERSON, B.—The defendant admits she executed the deed; but says she did it under certain circumstances. You say you will prove the date and signature of the deed without allowing the circumstances to be proved. My opinion is that you ought to prove the *corpus* of the cause in the ordinary manner. You might otherwise keep a witness out of the way, and thereby open the door to the greatest fraud. I think the objection valid; but, under the circumstances, I shall allow the cause to stand over, to give the plaintiff an opportunity to exhibit interrogatories for the purpose of proving the deed.

It being urged by some of the counsel for the defendants, that to allow the cause to stand over under such circumstances would be contrary to all practice; his Lordship said he would consider the matter before he decided that point.

On a subsequent day his Lordship stated, that he had consulted the Vice-Chancellor on the subject, who was of opinion, that it was quite consonant with the practice of the Court to allow a cause to stand over in such a case. It was accordingly ordered that the cause should stand over, with liberty to the plaintiffs to exhibit interrogatories to prove the deed; the defendants to be at liberty to cross-examine the plaintiff's witnesses, and to exhibit interrogatories to prove such matters as they should be ad-

vised ; the plaintiff to pay the defendants the taxed costs of the day.

1835.

MABER
v.
HOBBS.

Mr. *Boteler* and Mr. *Wood*, for the plaintiff.

Mr. *Simpkinson* and Mr. *Kenyon Parker*, for the defendants, Mr. and Mrs. *Hobbs*.

Mr. *G. Richards*, Mr. *Bethell*, and Mr. *Prendergast*, for other defendants (a).

(a) The following note has been kindly communicated to the Reporter :—

Endo v. Culshaw.—In *Exchequer*, 30th April, 1832.—This was a suit brought against the executors of *John Spencer* for an account of his residuary personal estate, undisposed of by his will. The plaintiffs were *Anne Endo*, a sister of the testator, and *Ann Wilson*, the personal representative of *Margaret Spencer*, the other sister of the testator. By their answer the defendants stated that they had rendered true accounts of the residuary estate to *Anne Endo* and *Margaret Spencer*, who were both satisfied with those accounts, had been paid the amount due to them respectively, and had signed receipts for such payments.

Mr. *Elmsley*, for the defendants, moved for liberty to prove these receipts as exhibits *vivâ voce*. The motion was special, that the witnesses might be enabled to leave town before the hearing, which was not to take place immediately.

Six receipts were then produced. Five appeared to be executed by *Anne Endo*, and the other by *Margaret Spencer*. Upon inspection, a great difference appeared in the handwriting of *Anne Endo* to four of the receipts, and to the other her mark was put. They were all proved by the attesting witnesses.

Lord LYNDMURST, C. B., expressed his surprise at a practice which allowed documents to be proved *vivâ voce*, and inquired if it extended to such exhibits as these ; but upon being assured by the counsel then in Court, that they thought it did, he permitted them to be proved, but not without great hesitation and reluctance; declaring that if they had been produced at *Nisi Prius*, many more questions would have been asked than were necessary for their mere formal proof—questions suggested by the appearance of the documents themselves, and which might have led to much important evidence.

1835.

Ex parte TOWGOOD.—In the Matter of the LONDON BRIDGE ACTS.

Dec. 15th.

Devisees of lands in trust for charitable purposes, having sold part of those lands under the provisions of the *London Bridge Acts*, were held not entitled to their costs out of the fund arising from the sale; although the will creating the trust directed that the estate should defray the expenses of defending the trust property.

THE petitioners were devisees in trust under the will of the Reverend *Daniel Williams*, D.D., who died in the year 1715, having by his will devised considerable estates in the city of *London* in trust for various charitable purposes. The will contained this paragraph—"If also my heirs successively shall be at any charge to defend what is committed to their support as my trustees, or what shall be further ordered by me, my estate shall defray it."

Part of these estates, being required for the approaches to *London Bridge*, were purchased by the mayor, commonalty, and citizens of the city of *London*, at the price of 4000*l.*, which was accordingly paid by the purchasers into the Bank of *England*, in the name of the Accountant-General of this Court, as directed by the act (a).

The expenses incurred by the petitioners in surveying and valuing the property, attending before the jury, investigating the title, &c. amounted to 389*l.*; and they now prayed that that sum, and also the costs of this petition and incidental thereto, might be paid to them out of the said sum of 4000*l.*; and that the residue thereof, until a suitable purchase of other lands could be made, might be invested by the Accountant-General in the 3*l. per cent.* consols; the dividends, as they accrued due, to be paid to the petitioners.

Mr. *Norton* for the petition, cited *Ex parte Layfield* (b).

The LORD CHIEF BARON was of opinion that he had no authority under the act to allow the petitioners their costs and expenses out of the fund.

(a) See ante, p. 76.

(b) See ante, p. 79.

1835.

Dec. 18, 19.
1836.
Feb. 24th.

LEES v. MOSLEY and Another.

Before the LORD CHIEF BARON, PARKE, B., ALDERSON, B.,
and GURNEY, B.

ROBERT Feilden, by his will, after bequeathing the bulk of his personal property to his wife, and after devising various real estates in the counties of *Lancaster* and *Chester* to his eldest son *Robert Mosley Feilden* in fee, devised as follows:—"I give and devise all that my freehold lease of a farm in *Prestbury*, in the county of *Chester*, called *Barber's* tenement, and all and every my chief rents in the town of *Manchester*, and also my two warehouses in *Poolfold*, in the said town (subject to a mortgage for 4000*l.* secured thereon), unto my two sons, *Henry James* and *Oswald Feilden*, in moieties, as tenants in common, and not as joint tenants, in such manner and subject to such charges as hereinafter mentioned, that is to say, as to one moiety or equal half part thereof, to my son *Henry James* for life, with remainder to his lawful issue and their respective heirs, in such shares and proportions, and subject to such charges as he the said *Henry James* shall by deed or will appoint; but in case my said son *Henry James* shall not marry and have issue, who shall attain the age of twenty-one years, then I give and devise the said moiety to my son *Oswald*, and his heirs for ever." And as to the other moiety of the said farm, chief rents and warehouses, the testator gave and devised the same to his son *Oswald* and his heirs absolutely for ever.

Testator devised as follows: "I give and devise all that my freehold lease in *P.*, and all and every my chief rents in the town of *M.*, and also my two warehouses in the said town, unto my two sons, *H. J.* and *O.*, in moieties, as tenants in common, and not as joint tenants, in such manner and subject to such charges as hereinafter mentioned, (that is to say), as to one moiety or equal half part thereof to my son *H. J.* for life, with remainder to his lawful issue and their respective heirs, in such shares and proportions, and subject to such charges as he the said *H. J.* shall by deed or will appoint; but in case my said son *H. J.* shall not marry and have issue who shall attain

At the date of the will and of the death of the testa-

the age of twenty-one years, then to my son *O.* in fee:—*Held*, that *H. J.* took an estate for life in the moiety, with remainder to his children as tenants in common in fee.

Whatever be the *prima facie* meaning of the word "issue" in a will, it is not a technical expression, and will yield to the intention of the testator to be collected from the words of the will; and therefore it requires a less demonstrative context to shew the testator's intention in regard to the word "issue" than in regard to the technical expression "heirs of the body."

1835.

LEES
v.
MOSLEY.

tor, *Henry James Feilden* was a bachelor. Upon the death of the testator, he entered upon and suffered a recovery of his moiety of the property so devised to himself and *Oswald*, and the whole was afterwards conveyed to the defendants as trustees for sale.

The property having been put up for sale by auction in lots, the plaintiff attended at the sale, and was declared the purchaser of Lot 1, which comprised the warehouse at *Manchester*. He accordingly paid his deposit, and entered into a written agreement with the vendors to complete the purchase, upon having a good title made to him. He afterwards, however, upon learning the state of the title under the foregoing will, refused to complete his purchase, contending that *Henry James Feilden* having only a life estate in the property devised to him, the recovery suffered by him was inoperative to convey his moiety of the estate to the defendants. The defendants, on the other hand, insisting on their title to sell, the present bill was filed, praying for the delivery up of the agreement, and the return of the deposit; and the question at the hearing was, whether *Henry James Feilden* took an estate for life, or an estate tail under the will. The case originally came on and was partly heard before *Alderson*, B., at *Gray's Inn Hall*, when his Lordship reserved it for further argument before the full Court, on account of the general importance of the question.

Mr. *Preston*, Mr. *Duckworth*, and Mr. *Lynch*, for the plaintiff.—The question is, whether the children of *Henry James Feilden* take by descent from their father, the words of the devise creating an estate tail in him, or whether they take as purchasers in their own right. We contend for the latter proposition. A gift to *A.* and his issue singly, is beyond doubt an estate tail: *King v. Mel-ling* (a). A devise to one for life, and after his decease to his issue, standing singly, is a gift to him as tenant in

(a) 1 Ventr. 232.

1835.

LEES
v.
MOSLEY.

tail, for the purpose of including all his descendants. It may be conceded also, that where there is a gift to one for life, and after his decease to his issue or issue male as tenants in common and their heirs, it has, under circumstances, been held to be an estate tail: *King v. Burchell*(a). But in that and similar cases, there was a limitation over, on an indefinite failure of issue of the parent. In such cases, the estate has been held to be an estate tail to effectuate the general intention of the testator, and that the remainder over may take effect. If the gift here had been to the "heirs of the body," as in *Shelley's case*(b), then, though the gift to the parent might be in express terms for life, that taken singly would not have excluded the estate tail: but here, the gift is to the "issue," with superadded words of limitation, "and their heirs." The issue, therefore, are capable of taking a fee simple as purchasers, and it is for their benefit to do so. The gift, therefore, is clearly a gift to the parent for life, with remainder to his children as purchasers in fee. There is no occasion to hold it to be an estate tail in the parent, because the children themselves take an estate of inheritance. It is unnecessary to have recourse to the general intention in opposition to the particular intention. But then it will be said that there is a limitation over in this case. The terms of that limitation, however, instead of supporting the construction of an estate tail, defeat it. The ulterior gift is not to take effect upon a failure of issue generally, but in an event totally distinct from it, and which might have excluded the issue, namely, "in case my said son shall not marry and have issue who shall attain the age of twenty-one years." In *Doe d. Davy v. Barnsall*(c), there was a limitation of the same nature. The gift was in one entire clause, to M. O. and the issue of her body as tenants in common. The limitation over was

(a) Ambl. 379; 1 Eden, 424.

(b) 1 Rep. 93.

(c) 6 T. R. 30; 1 B. & P. 215.

1835.

LEES
v.
MOSLEY.

“in default of such issue, or living such they should all die under the age of twenty-one years;” and the Court held that the issue took as purchasers as tenants in common in fee. The fee sprung up from the limitation over. In this case Lord *Kenyon* relied on *Lodding v. Kime* (a), in which the devise was to *A.* for life, with a limitation to his issue male and their heirs for ever, and no limitation over upon a failure of issue generally, and the Court held, that *A.* took an estate for life. *Doe d. Long v. Laming* (b) is an authority upon the same point. There the gift was to *A.* and the heirs of her body, and their heirs, and there was no limitation over on failure of issue. It was contended, that “heirs of the body” must of necessity be words of limitation, and not purchase; but Lord *Mansfield* combated that notion, and held, under the circumstances, that the heirs of *A.*’s body took as purchasers in fee. *Right d. Shortbridge v. Creber* (c) and *Doe d. Cooper v. Collis* (d) are authorities to the same effect, there being no limitation over in either case after a failure of issue generally. In *Willcox v. Bellaers* (e), the devise was to *H. T. W.* for life, and after his decease to such of his children as he should by will appoint, and to their heirs; and for want of such appointment, to the heirs of the body of the said *H. T. W.* and their heirs. Then followed a limitation over, like that which occurs in this case, namely, that in case *H. T. W.* should happen to die without issue, then from and immediately after his decease, the testator devised the property to another person for her life (f), with limitations over. The Court was so strongly of opinion that *H. T. W.* took only a life estate, that the purchaser was not compelled to take the

(a) 1 Salk. 224.

(b) 2 Burr. 1100.

(c) 5 B. & C. 866; 8 D. & R. 718.

(d) 4 T. R. 294.

(e) Turn. & Russ. 491.

(f) See *Barlow v. Salter*, 17 Ves. 482.

1835.

LEES
v.
MOSLEY.

title. *Jesson v. Wright* (a) is distinguishable from the present case. That was simply an estate tail, and there was nothing to hinder it from being so considered, except the word "child." There were not even superadded words of limitation to the heirs general. It was, in effect, a gift to the party and the heirs of his body simply. In the present case, in order to create an estate tail in *Henry James*, the Court must strike out of the will the words "who shall attain the age of twenty-one years;" but such a step will not be taken, unless there is no other mode of giving the will a rational construction. [The *Lord Chief Baron*.—You say that the limitation over is only upon one event, namely, in case the parent should have no child who should live to twenty-one. Suppose he had one son who married, and died before twenty-one, leaving a son? *Alderson, B.*—In that case there is a difficulty; for if the word "issue" mean children only, and not grand-children, the estate would go over.] In *Hockley v. Mawbey* (b), the word "issue" was held to embrace all the descendants of R., whether children or grand-children, living at his death. [*Parke, B.*—You construe issue to be issue living at the death of the son. Suppose it means any descendants, it would make the limitation over too remote; but I do not know that that would hurt your argument.] The Court would probably only say that the testator intended something which he could not carry into effect. Suppose some of the descendants are disappointed, is that so objectionable as taking the estate away from the other children and giving it to the eldest son? The testator meant to give the benefit of the devise to as many of the family as possible.

It will be contended that the word issue in this case is not less inflexible than the words "heirs of the body;" and that the words of limitation engrafted upon that word

(a) 2 Bligh, 1. (b) 1 Ves. jun. 143; 3 Bro. C. C. 82.

1835.

LEES
v.
MOSLEY.

will not affect the proposition that this is an estate tail in the parent. In many cases, as in *Shelley's case* (a), it has been held, that the grafting words of limitation upon them will not change the words "heirs of the body" into words of purchase, unless they turn the order of succession of the heirs out of the ordinary course. The word "issue," however, is more flexible than the expression "heirs of the body." In the case of *Carslaw v. Newland* (b), the word "issue" was held to be a word of purchase. In *Crump d. Woolley v. Norwood* (c), the gift was to the parent for life, with remainder to the heirs of his body, with superadded words of limitation; and the Court held that the estate expectant on the parent's life estate was a contingent remainder: therefore holding that the issue of the parent took as purchasers. That was a stronger case than the present, because here the gift is to the issue *eo nomine*. In *Hockley v. Mawbey* (d), the devise was to R. and his issue, to be divided amongst them as he should think fit, and if R. should happen to die without issue lawfully begotten, then over: Lord Thurlow held that the issue took as purchasers. *Doe v. Collis* (e), *Merest v. James* (f), and *Doe d. Strong v. Goff* (g), are authorities to the same effect. [*Parke, B.*—Must not *Doe v. Goff*, and *Crump v. Norwood*, be considered overruled by *Jesson v. Wright*?] Those cases are stated to be overruled, but chiefly by learned writers who have carried their own particular views too far (h). *Jesson v. Wright* might have been decided without overruling *Doe v. Goff*; and consequently the observations of

(a) 1 Rep 93.

(b) 2 Bing. N. C. 58.

(c) 7 Taunt. 362; 2 Marsh. 161.

(d) 3 Bro. C. C. 82; 1 Ves. jun. 143.

(e) 4 T. R. 294.

(f) 1 Brod. & Bing. 484; 4

Moore, 327.

(g) 11 East, 668.

(h) See Hayes's Inquiry into the Effect of Limitations to Heirs of the Body, sect. 4; Jarman's edit. of Powell on Devises, Vol. 2, p. 477, &c.

Lord *Redesdale* upon the latter case were mere unnecessary dicta. Besides, the same learned writers who state *Doe v. Goff* to be overruled, admit that the children in that case might have taken the fee, which entirely sweeps away Lord *Redesdale's* reason for overruling it. [The Lord Chief Baron.—It cannot be said that *Doe v. Goff* is overruled, except upon the words “share and share alike as tenants in common.” Those words might be inconsistent with the words “heirs of the body;” but they may not be inconsistent with the word “issue.”] Nor is there any sufficient reason for saying that the case of *Crump v. Norwood* (a) is overruled.

The next observation to be made is, that here the limitation to the issue is by way of remainder. That distinguishes this case from *Wilde's case* (b), and *Broadhurst v. Morris* (c). Now in *Doe d. Gallini v. Gallini* (d), *Denman, C. J.*, in delivering the judgment of the Court, observes, that, according to the late cases, technical words in a will must have their legal effect, even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical words in their proper sense. Now there is nothing to shew that the testator did not mean to use the words “with remainder” in their technical sense; and even upon that principle the construction contended for by the plaintiff is clearly made out. The superadded words of limitation are also of great importance; and it may be remarked, that such words constitute the difference between the case of *Doe v. Laming* (e), on which we rely, and that of *Doe d. Bosnall v. Harvey* (f). Now, those words cannot be satisfied by giving

1835.

LEES
v.
MOSLEY.

(a) 7 Taunt. 362. See Jarman on Devises, Vol. 2, p. 481.

(b) 6 Rep. 17 b.

(c) 2 B. & Ad. 1.

(d) 5 B. & Ad. 640; 2 Nev. & M. 632.

(e) 2 Burr. 1100.

(f) 4 B. & C. 610; 7 D. & R. 78.

1835.

LEES
v.
MOSLEY.

an estate tail to the parent. In *Doe v. Collis* (a), the superadded words gave weight to the construction that the children took as purchasers; whereas, from the want of those words, the same Judges who decided that case, decided differently in *Doe d. Blandford v. Applin* (b). In *Backhouse v. Wells* (c), there were words of limitation grafted on the words issue male, and it was held that the issue took as purchasers. [The Lord Chief Baron.—There the devise was to the parent for his life “only.”] According to *Robinson v. Robinson* (d), that would not affect the construction. The case of *Denn d. Webb v. Puckey* (e), and others of that class, are distinguishable from the present. There, as well as here, there were superadded words of limitation; but here, those words, for the reason given by Mr. *Fearne* (f), have the effect of controlling the previous word “issue,” so as to prevent the ancestor from taking an estate tail. The reason is, and this did not apply in *Denn v. Puckey*, that the words engrafting the fee, point out a different mode of descent than the previous words would do if there were no engrafted words. For the same reason, the present case is distinguishable from *Roe d. Dodson v. Grew* (g). In addition to which, in both those cases, there was a limitation over upon an indefinite failure of issue. In *Doe d. Gillman v. Elvey* (h), the words, “equally to be divided,” annexed to the superadded words of limitation, were held to prevent *H. Gillman* from taking an estate tail; and the word “respective” will have the same effect here. In *Doe d. Hallen v. Ironmonger* (i), other words annexed in the same manner had a similar effect. In *Mogg v. Mogg* (k), which was very like the present case, and in *Franklin v. Lay* (l), the

(a) 4 T. R. 294.

(b) 4 T. R. 82.

(c) 1 Eq. Ca. Abr. 184; pl. 27.

(d) 1 Burr. 38.

(e) 5 T. R. 299.

(f) Conting. Rem. 182, 183.

(g) 2 Wils. 322; Wilm. 272.

(h) 4 East, 313.

(i) 3 East, 533.

(k) 1 Mer. 654.

(l) 2 Bligh, 59, n.

effect of the superadded words of limitation was destroyed by the limitation over upon an indefinite failure of issue. In *Doe v. Goff* (a), *Doe d. Candler v. Smith* (b), and *Doe d. Cole v. Goldsmith* (c), there were no such superadded words; therefore no argument can be drawn from those cases against the plaintiff. In addition to the other authorities in his favour, are *Gretton v. Haward* (d), *Ginger d. White v. White* (e), *Goodright d. Docking v. Dunham* (f), *Ryan v. Cowley* (g). The case of *Hockley v. Mawbey* (h) is a very strong authority for the plaintiff, for there there was no gift to the children except in the words of the power. In *Jesson v. Wright*, in which the points of difference from the present case have been already noticed, Sir *Edward Sugden* argued *ad inconvenienti*; observing, that, upon the death of each child, the share of each would go over (i). Here no such difficulty exists, because words of inheritance are given to the issue. Lord *Eldon* appears to have contemplated that a case like the present might occur, when he said—"The words, 'heirs of the body,' will indeed yield to a particular intent; and that may be from the effect of superadded words, or any expressions shewing the particular intent of the testator (k)."

The difficulty arising from the suggestion, that *Henry James* might have a child who might die under twenty-one leaving a child, seems to be met by the observations of *Tindal*, C. J., upon a similar point, in delivering the judgment of the Court in *Gallini v. Gallini* (l), in error. He says, "It is objected against this construction, that if an estate tail is given to the grandchildren as purchasers, and one of the

1835.

LEES
v.
MOSLEY.

(a) 11 East, 668.

(b) 7 T. R. 531.

(c) 2 Marsh. 517; 7 Taunt. 209. 82.

(d) 2 Marsh. 9; 6 Taunt. 94.

(e) Willes, 348.

(f) 1 Dougl. 264.

(g) Ca. temp. Sugd. 7.

(h) 1 Ves. jun. 143; 3 Bro. C.C.

(i) 2 Bligh, 14.

(k) 2 Bligh, 53.

(l) 4 Nev. & M. 894.

1835.

LEE'S
v.
MOSLEY.

children had died in the lifetime of the testator, and had left issue, that issue could not have inherited, but the devise as to such grandchild would have been altogether defeated. It must be admitted that such would be the consequence; but it must be observed, that if the supposed event took place in the lifetime of the testator, it was open to him to make such new disposition of his property as he might think fit upon that contingency taking place; and the argument, therefore, is not entitled to the same weight, as where a failure in the manifest intention of the testator must necessarily follow by an event which takes place after his death, and over which he has no control." Therefore the testator's general intent is not to be set aside because it may fail upon one particular event. Here, after the devise to *Henry James* for his life, there is a contingent remainder to his children if he should have any; but if he should not marry and have issue who should attain twenty-one, the estate goes over. If he has children and they die under twenty-one, it turns the remainder over into an executory devise: *Gulliver v. Wicket* (a), *Doe d. Harris v. Howell* (b).

Upon the whole, we submit that this is an estate for life in the parent *Henry James*, with a contingent remainder to all his children in fee as tenants in common; that, upon the birth of a child, the remainder which was contingent becomes vested in that child; that, upon the birth of another child, the estate opens and lets in that child, and so on; and that, when all are *in esse*, they become tenants in common in fee, subject to the power of distribution in the parent, and subject to be divested in this event only—namely, upon the death of all the children under twenty-one; and that there is an ultimate contingent remainder in fee to the testator's son *Oswald* in the event of *Henry James* dying without children, but in case

(a) 1 Wils. 105.

(b) 10 B. & C. 191; 5 M. & R. 24.

he die leaving children who die under twenty-one, then an executory devise to *Oswald*.

1835.

LEES
v.
MOSLEY.

Mr. *Temple*, Mr. *Hodgkin*, and Mr. *Bagshawe*, for the defendants.—*Henry James Feilden* took an estate tail. First, there are technical words in the will sufficient to bring the case within the rule in *Shelley's case*; secondly, taking the rule respecting technical words in a will to be as laid down in *Jesson v. Wright*, there is nothing here to control those words. In *Shelley's case*, the gift was to the “heirs male of the body,” but those words are not essential to give an estate tail. The word “issue” is equally efficient for that purpose, and is *prima facie* a word of limitation: *Doe d. Dodson v. Grew* (a). In *Doe v. Gallini* (b), *Denman*, C. J., in delivering the judgment of the Court, says, that the word issue embraces the whole line of descendants generally, and is synonymous with “heirs of the body.” That being so, it is clear that a devise to *A.* for life, with remainder to his lawful issue and their heirs, putting out of the question all controlling words, gives *A.* an estate tail: *Goodright d. Lisle v. Pullyn* (c). Then the rule is, that technical words in a devise shall have their legal effect, unless there are other words which clearly deprive them of their ordinary signification. That has been frequently laid down; but more especially by Lord *Redesdale* in *Jesson v. Wright* (d), and by Lord *Alvanley*, in *Poole v. Poole* (e). [The Lord Chief Baron.—The words “heirs,” and “heirs male,” in those cases, must be words of limitation, because heirs are not co-existent. That does not necessarily apply to the word “issue,” which may mean existing issue, or all the descendants. *Alderson*, B.—When the words “heirs of the body” are used in their proper sense, it is certain that heirs in

(a) 2 Wils. 322; Wilm. 272.

(c) 2 Ld. Raym. 1437.

(b) 2 Nev. & M. 633; 5 B. & Ad. 642.

(d) 2 Bligh, 57.

(e) 3 B. & P. 627.

1835.

LEES
v.
MOSLEY.

succession are meant. Therefore, a devise to heirs of the body, "share and share alike," is an inconsistency; but a devise to the issue, "share and share alike," is not necessarily so.] If we can shew that "issue" is equivalent to heirs of the body, the cases cited apply. In *Doe v. Grew* (a), Gould, J., speaks of "issue" as synonymous with "heirs." Even words which seem to designate particular persons, as "sons," "children," &c., may be held to be words of limitation, and to confer an estate tail: *Mellish v. Mellish* (b). So the words "heir male," in the singular number, may be held to include all the issue in order to effect the general intention. The word "issue," however, is in itself a word of limitation, and includes all the descendants, unless the contrary be shewn. In *Hargrave's Collectanea Juridica*, Vol. 1, p. 408, Lord Hardwicke says, that it has been established ever since the case of *King v. Melling*, that the words "issue of the body" are as strict as "heirs of the body," and equally give an estate tail. It is clear, also, from *Sibley v. Perry* (c), that Lord Eldon was of opinion, that the word "issue" is *prima facie* a word of limitation.

Then, is there any thing in this will to control the meaning of the word "issue," and to take it out of its ordinary sense as a word of limitation? It is clear that the testator never contemplated that *Oswald* could take any interest in *Henry James's* part of the estate, until all the descendants under *Henry James* were extinct. The plaintiff's construction leaves one of those descendants totally unprovided for. The testator gives his son a power to appoint the estate to the issue, in such shares and subject to such charges as he shall think fit; shewing he intended to give him a larger interest than a mere life estate. [The Lord Chief Baron.—Supposing the power

(a) 2 Wils. 322.

(b) 2 B. & C. 520 ; 3 D. & R. 804.

(c) 7 Ves. 522.

1835.

LEES
v.
MOSLEY.

of appointment to be valid, the question whether *Henry James* took an estate for life or in tail would depend on the will which he made himself. But how, in the absence of a power executed by *Henry James*, can you call on a Court of equity to declare the rights of the parties? I thought a Court of equity would only do that which it might be supposed the party would have done himself: *Kennedy v. Kingston* (a).] Notwithstanding the power of selection, the Court may declare this to be an estate tail in the parent. That power, until it is executed, in no way affects or neutralizes the estate tail. This is a gift to a father in tail, with a power of appointment enabling him to cut down his own interest to that of an estate for life. Whether done by a shifting clause in a settlement or by a power in a will, it is the same thing. [The *Lord Chief Baron*.—Then you must admit that, until you know what the will is, the estate is uncertain.] That will not affect the defendants' equity, because a parent may by his own acts extinguish the power which he was entitled to execute by his will: *Smith v. Death* (b), *West v. Berney* (c), *Bickley v. Guest* (d). That the power will not control the previous words, so as to give the ancestor an estate for life only, is clear from *Doe v. Goldsmith* (e). [Alderson, B.—There, the same words were used as in *Doe v. Grew* (f): namely, "heirs of the body," not issue. It is dangerous to suggest an equivalent, and then argue on the equivalent as the thing itself.] *Seale v. Barter* (g), and the argument in *Jesson v. Wright*, are to the same effect. [The *Lord Chief Baron*.—Where an estate tail is given in clear words, an additional power, inconsistent with that estate, is void.] With respect to the words "tenants in com-

(a) 2 Jac. & W. 431.

(b) 5 Madd. 371.

(c) 1 Russ. & M. 431.

(d) Id. 440.

(e) 2 Marsh. 517; 7 Taunt. 209.

(f) 2 Wils. 322.

(g) 2 B. & P. 485.

1835.

LEES
&
MOSLEY.

failure of issue. *Crump v. Norwood* (a) cannot easily be reconciled with the other authorities. *Willcox v. Bel- laers* (b) is not applicable. [The *Lord Chief Baron*.— That is not a decided case, and, therefore, no authority.] *Backhouse v. Wells* (c) depended on the word “only.” The present case falls within the rule in *Shelley’s case*, a rule which ought not to be frittered away by nice distinctions. By construing the estate in *Henry James* to be an estate tail, the testator’s intention will be best complied with, and none of his descendants in that line will be disappointed.

Mr. *Preston*, in reply.—The word “issue” is not a technical word, though the words “heirs of the body” are: *Lovelace v. Lovelace* (d). *Burnsall v. Davy* also shews that “issue of the body” does not necessarily mean “heirs of the body.” In *Doe v. Harvey*, there were no superadded words of limitation, and the Court thought, that, in the absence of those words, they were bound by the case of *Jesson v. Wright* to reject the words of modification “tenants in common,” and to hold the estate in the ancestor to be an estate tail. The word “issue” is only used for “heirs of the body” for the purpose of the statute *de donis*. Not that it may not be synonymous with other words in certain cases; but it is only when used for descendants that it is tantamount to heirs of the body. Here, the testator uses the word “issue,” and not as in *Goodright v. Pullyn* and other cases “heirs of the body.” Besides, he introduces this limitation with the words “with remainder,” which means that there must be a particular estate to support it. The Court is asked to put a construction on this will, by which one branch of the family shall take the whole property to the exclusion of

(a) 7 Taunt. 362; 2 Marsh. 161.

(b) Turn. & Russ. 491.

(c) 1 Eq. Ca. Abr. 184, pl. 27.

(d) Cro. Eliz. 40.

the other branch. That was not the testator's intention, and the Court cannot disappoint the particular intention unless there be a general overwhelming intention requiring it. The mere circumstance of the testator's forgetting that by the limitation over in case of the issue dying under twenty-one, some of his descendants might on a certain event be defeated, is not a sufficient reason for construing this an estate tail. If *Jesson v. Wright* be correctly reported, Lord *Redesdale* did not see the true bearings of *Doe v. Goff*, and throughout the argument in the former case the authority of the latter is not disputed. If the testator intended to give an estate tail, it is clear that knowing, as he did, the meaning of technical words, he would have used the proper words for that purpose. Besides, the words "in such shares and proportions" are not applicable to one, but to a plurality of persons. It is argued, that in order to comprehend all the issue of *Henry James*—for instance, his grandchildren—living at his death, the limitation over must be considered as taking place upon an indefinite failure of issue. That, however, is not necessary. Even if the word used had been "child" instead of "issue," there is authority for saying that not only the issue in the first degree, but any of the family who had attained twenty-one, might take: *Doe d. Smith v. Webber* (a). Suppose, in this case, there had been a son and a grandson, and the son had died under twenty-one, the grandson attaining twenty-one would have been entitled to the fee. Upon the whole, there is no case where the word "issue," with superadded words, has not been held to be a word of purchase, unless there be a clear intention to the contrary. In *Jack d. Featherstone v. Featherstone*, there were no superadded words of limitation. *Smith v. Death*, and other cases of that class, are not applicable here; but, even if they were, their authority has been much doubted in the profession.

1835.

LEES
v.
MOSLEY.

(a) 1 B. & Ald. 713.

1836.

LEES

v.

MOSLEY.

Feb. 24th.

ALDERSON, B., now delivered the judgment of the Court. After reading the clause of the will above stated, his Lordship proceeded as follows:—The question is, whether under this devise *Henry James Feilden* took an estate for life or an estate tail.

It has been long settled, that in construing devises the governing principle is, the intention of the testator to be collected from the words of the will itself. In order to ascertain that intention, however, the Courts have adopted rules which no doubt it is very desirable should be as clearly and distinctly laid down as possible, and generally acted upon. And with this view it is often far better that the particular objects of individual testators should occasionally be frustrated rather than that there should be a general uncertainty in the titles to real estates, productive, as such uncertainty always must be, of expense, and presenting, as it must in many cases do, obstacles to the easy transmission of landed property from one purchaser to another.

But in endeavouring to attain this laudable object, the Courts must take great care, and exercise much watchfulness, lest from a mere love of generalisation they shake titles already existing, with a view to future and theoretical good. Upon a careful examination of the authorities, we think that it may be safely laid down as a rule, that in a devise technical words, or words of definite meaning, shall always be construed according to their legal or definite effect, unless, from other inconsistent words in the will, it be quite clear that they are used in some other definite sense. Thus, if the words “heirs of the body,” which are technical words, properly admitting only of one meaning, are used, it becomes necessary to shew affirmatively that the testator meant clearly to use them as words of purchase; or, more correctly, as words descriptive, not of all the descendants of the body, but of one definite class only of such descendants. It is not

enough to raise a reasonable doubt whether he intended to use them as words of limitation, or to shew a probable conjecture that he intended to designate children only by that phrase.

1836.
 LEES
 v.
 MOSLEY.

Thus, in the case of *Jesson v. Wright* (a), the House of Lords, overruling the previous decision of the *King's Bench*, held, that *W. W.* took an estate tail. There the devise was to *W. W.* for life, remainder to the heirs of the body in such shares as *W. W.* should appoint; and for want of such appointment, to the heirs of the body, share and share alike, as tenants in common; and if but one child, the whole to such one child; and for want of such issue, then over. Now there the only circumstances to control the words "heirs of the body" were the provision that they should take as tenants in common, and the use of the word "child." Both these circumstances might, not unreasonably, apply to the mode in which the testator intended the heirs of the body to take, (a mode which the law would not allow,) and by no means clearly shewed that he meant to limit those words to the children of *W. W.* only, excluding their descendants, and to devise over the estate before there should be a total failure of the descendants of *W. W.*—a conclusion to which all the various inconveniences so forcibly pointed out in that argument would lead.

Another instance of the application of the rule with which we began, may be found in that class of cases in which "sons" or "children," which in their proper sense are words of purchase, have been held to be words of limitation. There, in like manner, it must be demonstrated from the will affirmatively and clearly, that by these expressions the testator meant all the descendants of the body to take as heirs.

There is, however, a third class of cases where a testa-

(a) 2 Bligh, 1.

1836.

LEES

v.

MOSLEY.

tor uses in his will an expression, in its ordinary use not of a technical nature, and capable of more meanings than one. Now here the investigation takes a different course. It will be merely directed to the solution of the question in what sense the testator intended to use the expression, and to ascertain whether the evidence preponderates in favour of the one rather than the other meaning or meanings of the word in question; regard being always had to the *prima facie* sense, or to that in which the word is most ordinarily used, in weighing the evidence contained in the will upon which the Court is ultimately to decide.

The first point, therefore, to be considered is—whether “issue” be a word of this nature. Now we think that this sufficiently appears, from referring to the various authorities. The first is the statute *de donis* (a), in which this word is used, and in which it sometimes means children, and sometimes all the descendants, according to the context in which it is found. Thus, after stating the cases of estates upon condition, &c., it proceeds thus:—“In all the cases aforesaid, after issue begotten and born (*post prolem suscitata et exuntem*) between them to whom the lands were given under such condition heretofore, such feoffees had power to alien.” There, it is plain, issue means child, for the power exists as soon as a child is born. Again, the statute speaks of land reverting to the donor:—“If issue fail, in that there is no issue at all; or if any issue be, and fail by death, or heir of the body of such issue failing.” In this one sentence, the word is used in two senses: first, as intending all descendants; and secondly, as including the children only. And here too the Latin word used in the original is not “*proles*,” as before, but “*exitus*” throughout the sentence. This appears a decisive authority for its double meaning, and the books abound with others to the

(a) 13 Ed. 1, c. 1.

1836.
 LEBBS
 v.
 MOSLEY.

same effect. In all of them it is treated as a word capable of being used in different senses, either as including all descendants, in which case it is of course a word of limitation, or as confined to immediate descendants, or some particular class of descendants living at a given time. Probably it will be found most frequently used in the former sense, and it therefore most frequently has the effect of giving an estate tail to the ancestor. It might even, perhaps, be conceded that this is *prima facie* its meaning. But the authorities clearly shew, that whatever be the *prima facie* meaning of the word "issue," it will yield to the intention of the testator to be collected from the will; and that it requires a less demonstrative context to shew such intention, than the technical expression of "heirs of the body" would do.

Thus in *Roe v. Grew* (a), Lord C. J. *Wilmot* says, it is a word either of purchase or limitation as will best effectuate the intention of the testator: and in *Ginger v. White* (b), *Willes*, C. J., speaking of the word issue, says, "It does not *ex vi termini* create an estate tail in a will as 'heirs of the body' do in a deed, but only where it appears that the intent of the testator was that the word should have that construction, or at least where it does not appear that the intent of the testator was otherwise."

Again, in *Doe v. Collis* (c), Lord *Kenyon*, after argument on this very point, says, (and this shews how important a duty it is for reporters to give the argument as well as the judgment), that in a will "issue" is either a word of purchase or limitation, as will best answer the intention of the deviser, though in the case of a deed it is universally taken as a word of purchase. And in another part of the same case, comparing it with "heirs of the body," he says, that those words always give way with greater difficulty than the word "issue." And the latest case on the

(a) 2 Wils. 322.

(b) Willes, 340.

(c) 4 T. R. 294.

1836.

LEES
v.
MOSLEY.

subject contains a dictum of Sir *Edward Sugden* to the same effect: *Ryan v. Cowley* (a).

If this be so, the Court in the present case have to look to the terms in this will, in order to ascertain whether, by construing the word "issue" here as a word of purchase or of limitation, they best effectuate the intention of the devisor. The testator begins by devising an express estate for life to his son *Henry James*. He then devises in remainder to his lawful issue. If it stopped there it would be an estate tail. For the word "issue" might include all descendants; and here, all being unborn, no assignable reason could exist for distinguishing between any of them. And then the rule in *Shelley's case* would apply, and would convert the estate for life, previously given, into an estate tail. But the testator then adds, "and their respective heirs in such shares and proportions, and subject to such charges as he the said *Henry James* should by will or deed appoint." Now, according to the case of *Hockley v. Mawbey* (b), the effect of this clause would be to give the objects of the power an interest in an equal distributive share, in case the power were not executed. The clause, therefore, is equivalent to a declaration by the testator, that the issue and their respective heirs should take equal shares, but that *Henry James* should have a power of distributing amongst them the estate, in unequal shares, if he thought fit.

Now if issue be taken as a word of limitation, the word "heirs" would be first restrained to "heirs of the body," and then altogether rejected as unnecessary. The word "respective" could have no particular meaning annexed to it, and the apparent intention of the testator to give to *Henry James* for life, and afterwards to distribute his property in shares amongst the issue, would be frustrated.

(a) Ca. temp. Sugd. 7.

(b) 3 Bro. C. C. 82.

1836.

LEES
v.
MOSLEY.

On the other hand, if issue be taken as a word of purchase, designating either the immediate issue or those living at the death of *Henry James*, the apparent intention will be effectuated, and all these words will have their peculiar and ordinary acceptation. If then the will stopped here, it would seem clear that the Court ought to read "issue" as a word of purchase.

Then comes the devise over. "But in case my son *Henry James* shall not marry and have issue who shall attain the age of twenty-one, then I give and devise to my son *Oswald* in fee." Now the effect of such a clause, if superadded to a remainder to children, would be to shew an intention to give a fee to the children on their attaining twenty-one. And if by the former part of the will, the same estate has been given, it does not appear to be sound reasoning to draw the conclusion that such a clause can convert the estate previously given into an estate tail. In fact, the case of *Doe v. Burnsall* (a), is a distinct authority on this part of the case.

Upon the whole, therefore, we have no doubt in this case, that the testator's intention was not to give his son an estate tail; and we think that we best effectuate that intention by construing the words "lawful issue" in this will, accompanied by their context, as words of purchase; and in so doing, we do not impugn the authority of any decided case to be found in the books; for there is not one in which these words with such a context as in this will have ever been held to be words of limitation.

We therefore think for these reasons, that in this case *Henry James* took only an estate for life, and that there must be a decree for the plaintiff as prayed, with costs.

Decree accordingly.

(a) 6 T. R. 30.

1835.

Dec. 17th.

Where an answer had been put in by an illiterate defendant, unaccompanied by any affidavit by his solicitor as to its having been read over and explained to him previously to his being sworn, and the *jurat* did not state that he had affixed his mark to it in the presence of the commissioners; ordered, upon motion, that the answer should be taken off the file, for irregularity, with costs.

Objections to the form of the *jurat* of an answer cannot be waived by the parties to the suit.

PILKINGTON v. HIMSWORTH.

THE answer of the defendant in this case, who was an illiterate person, having been taken before commissioners in the country, the *jurat* was made out in the following form:—

“ This answer was taken, and the within-named *Francis Himsworth*, the defendant, was duly sworn to the truth thereof on the Holy Evangelists, at the office of *William Palmer*, situate &c.; the same having been carefully read over and explained to the said defendant, who appeared perfectly to understand the same, between the hours &c., &c., (here followed the date) by virtue of the commission hereunto annexed. Before us,

“ *J. Falconer*,

“ *W. Palmer.*”

The answer was not accompanied by any affidavit by the defendant's solicitor, shewing that it had been read over and explained to the defendant, and that he had made his mark thereto, in the presence of the solicitor and of the commissioners; though it appeared that affidavits of that nature had been generally made in similar cases.

Mr. *Simpkinson* and Mr. *Jeremy* now moved that the answer might be taken off the file for irregularity, with costs. They relied, *first*, on the want of an affidavit, as before stated; and, *secondly*, on the defect in the *jurat*, in not shewing that the answer had been explained to the defendant, either by his solicitor or any of the commissioners; or, that he had made his mark in the presence of the commissioners previously to his being sworn. In support of the motion they cited *Attorney-General v. Malim (a)*, and contended that the plaintiff's having taken

(a) 1 Younge. 376.

an office copy of the answer was no waiver of these objections: *Curzon v. De la Zouch* (a), *Yates v. Hardy* (b). The party could not make the objection till he had seen the answer.

1835.

PILKINGTON
v.
HINSWORTH.

Mr. S. Girdlestone, *contra*.—By taking an office copy of the answer, the plaintiff has precluded himself from objecting to the form of the *jurat*: *Sirr v. Benyon* (c). [The *Lord Chief Baron*.—I do not think so. This is not an irregularity which can be waived. The form of the *jurat* is not a matter between the parties, but arises from the rules of the Court.] There are various irregularities which a party may commit, without violating the rules of the Court. Irregularity in the *jurat* will not prevent him from being indicted for perjury; for the *jurat* is not a necessary part of the affidavit, which is set out in the indictment, and in which perjury is assigned: *Rex v. Emden* (d). No mischief, therefore, can result from considering the irregularity as waived; because the defendant will be still amenable for perjury: *Rex v. Benson* (e). Upon the question of waiver, *Sidgier v. Tyte* (f) is an authority for the defendant. [The *Lord Chief Baron*.—There, the irregularity proceeded from not filing the answer in time.] That point was adverted to in the argument, but the Court paid no attention to it. The present case cannot be considered as being governed by that of *Attorney-General v. Malim* (g), which must have been decided upon the merits, and not upon the mere point of practice. The affidavits which were read in support of that motion, related to facts which took place before the commissioners, and could not have

(a) 1 Swanst. 185.

(b) Jac. 223.

(c) Forrest, 22.

(d) 9 East, 445.

(e) 2 Camp. 508.

(f) 11 Ves. 202.

(g) 1 Younge, 376.

1835.

PILKINGTON
v.
HIMSWORTH.

been received for the purpose of aiding defects in the *jurat*. Those affidavits were conflicting, and the Court required further affidavits, and under those circumstances the answer was retaken. The conclusion, therefore, is, that the *jurat* was right in that case. [The *Lord Chief Baron*.—I certainly cannot see how such affidavits could be received, upon an objection to the *jurat*.] There is no rule requiring the answer to be read, or the party to make his mark in the presence of the commissioners. All that can be required is, that the commissioners should take the answer upon a due examination of the defendant, and return it engrossed to the Court: 1 *Fowler*, 367. Originally, it was not necessary that the defendant should sign his answer at all. The objection as to the want of an affidavit by the defendant's solicitor, is untenable. Such an affidavit may be necessary in a town cause, because the answer is sworn before a Baron who knows nothing of the circumstances of the case; but it cannot be necessary upon an examination before commissioners in the country.

Mr. *Simpkinson* in reply.—The decision in *Attorney-General v. Malim* turned entirely on the form of the *jurat*, though the defendant attempted to support his case by introducing matters connected with the merits. If it were not so, why did the second *jurat* differ from the first? (a) As to the other point, the practice of this Court requires that in the case of an illiterate defendant

(a) The Reporters are indebted to one of the officers of the Court for the forms of the *jurat* and affidavit on record, as used in *Attorney-General v. Malim*, upon the answer being retaken in that cause. They were as follows:—

“This answer was taken, and

the above-named defendants, J.M., M.J., T. K., T. C., and T. H., were severally duly sworn to the truth thereof upon the holy Evangelists at the office of W. F. W., situate in R. in the county of W., this 10th day of April, 1832, by virtue of the commission hereunto annexed,

an affidavit should be made by his solicitor, shewing that the answer is really that of the party sworn, and for that purpose stating that the defendant's mark was affixed to it in the presence of the solicitor and the commissioners. Such an affidavit is not required in the Court of *Chancery*; but, in the jurats returned in that Court, it is expressly stated that the party made his mark in the presence of the commissioners: *Smith's Practice*, Vol. 2, p. 505 (a).

1835.
 PILKINGTON
 v.
 HINSWORTH.

THE LORD CHIEF BARON.—I have no doubt upon the question of waiver; because assuming that the practice of

before us; the same having been previously read over and explained to the defendant T. H., who appeared fully to understand the same, and affixed his mark thereto in our presence.

“ W. F. W.

“ G. H.

“ J. S.

“ W. W.”

“ J. S., of R., in the county of W., solicitor, one of the commissioners named in the commission hereunto annexed, maketh oath and saith, that he this deponent did this 10th day of April, 1832, in the presence and hearing of W. F. W., G. H., and W. W., three other of the commissioners in the said commission named, distinctly and audibly read over and explain to the above-named defendant T. H. (as well as to the other defendants above named,) the contents of this their answer as above written. And that he, the said T. H., appeared fully to understand the same, and affixed his mark thereto in the presence of this deponent, and of the said W. F. W., G. H.,

and W. W., before he the said T. H. was sworn to the truth thereof as above certified. J. S.

“ Sworn at R. aforesaid,
 this 10th day of April, }
 1832, before me,

“ M. H. B., a commissioner
 for taking affidavits in the
 Court of Exchequer.”

(a) The officers of the Court of Chancery having been consulted for the purpose of this motion, certified that the jurats in that Court in the case of an illiterate defendant are in the following form—

“ This answer was taken, and the above-named defendant, A. B., has duly sworn to the truth thereof upon the holy Evangelists, at the house of &c., this day of (the same having been first read over and explained to the said A. B., who appeared perfectly to understand the same, and made his mark thereto in our presence) by virtue of the commission hereunto annexed.

“ C. D. } Commrs.
 “ E F. }

1835.

PILKINGTON
v.
HMSWORTH.

the Court requires that the jurats should be in a particular form, it is not competent for the parties to waive that requisite. In such matters they cannot impose upon the Court a consent of their own. Jurats and affidavits are considered as open to objection, when contrary to practice, at any stage of the cause. That is an universal principle in all Courts; depending not upon any objection which the parties in a particular cause may waive, but upon the general rule that the document itself shall not be brought forward at all, if in any respect objectionable with reference to the rule of the Court.

Whatever doubt I have, arises from the want of any previous settled rule of practice in these cases. I doubt whether the case of *Attorney-General v. Malins* was not decided on the ground of misconduct in the commissioners rather than on the practice of the Court, and unquestionably the very fact of receiving affidavits in order to discuss the *res gestæ* in the cause, would look as if the Court had instituted inquiries as to what the commissioners had done; which would be totally inconsistent with the question as to the *jurat*. On the other hand, if the objection had not been to the form of the *jurat*, I cannot help thinking that the same form would have been adopted in that case the second time as had been adopted in the first instance. On the contrary, however, another form was made use of, which removed the objections which are said to have been made to the first *jurat*.

Considering, therefore, *Attorney-General v. Malins* as settling the practice upon this point (and we have no knowledge of the practice but from decided cases), I think I shall consider that case as governing this, and that the same form of *jurat* which was objectionable there is equally objectionable here. I must, therefore, comply with this motion.

Motion granted.

THE plaintiff in this case, who was a farmer and land-surveyor, had employed the defendant as his bailiff at 10s. per week. In *February*, 1835, the plaintiff gave up his farm, and thereupon the relation between the parties ceased, the plaintiff believing that all accounts between them had been settled and paid. The defendant afterwards charged the plaintiff to the amount of 176*l.*, including 10*l.* alleged to be due from the plaintiff on his promissory note. The plaintiff refusing to pay this sum, the defendant commenced an action against him on the note, and also to recover 176*l.* for goods sold and delivered, work and labour done, money paid, and on an account stated. The plaintiff then filed his bill, alleging that the note in question had been long since paid, though left confidentially in the defendant's custody, and praying for a general account of the dealings and transactions between himself and the defendant, for discovery of evidence of the truth of the charges, and for an injunction to restrain the action.

The case made by the defendant was, that the plaintiff had employed a clerk in his business of surveyor, who had made acknowledgements which bound the plaintiff; and upon those merits the common injunction which had been obtained was dissolved. The defendant by his answer denied that the note in question had been paid, but admitted that it was one of the items of account between himself and the plaintiff, and that it was in his possession.

Mr. *Jeremy* now moved that the defendant might be ordered to deposit this note with his clerk in Court, with liberty to the plaintiff to inspect it; observing, that at the hearing the plaintiff might be able to shew, either from indorsements on the note or otherwise, that, at least, as to that item in the account, he was entitled to some relief.

1836.

PILKINGTON
v.
HIMSWORTH.
Feb. 18th.

Defendant admitting by his answer that he had in his possession a promissory note on which he had commenced an action against the plaintiff, but which the plaintiff by his bill alleged to have been long since paid, was ordered to deposit the same with his clerk in Court for the inspection of the plaintiff, although an injunction to restrain the action had been dissolved.

1836.

PILKINGTON
v.
HIMSWORTH.

Mr. *S. Girdlestone*, for the defendant.—The injunction has been already dissolved on the merits. The plaintiff has not such an interest in this note as to entitle him to have it produced in this Court. The note must be produced at the trial of the action, and it will then be competent for him to dispute its validity. This is in effect the defendant's title deed. Under similar circumstances the Vice-Chancellor refused to allow the production of a bill of exchange. [The *Lord Chief Baron*.—Suppose it had been suggested to be a forged bill, would not a Court of equity have allowed the plaintiff inspection? If the Vice-Chancellor thought otherwise, he must have been of opinion that he had a more limited power than is exercised by a Judge at law.] In *Freeman v. Baker* (a), a person drew a bill upon *Roberts*, one of the directors of a company, who accepted it in the name of himself and the other directors. It was then indorsed to *Freeman*, who brought an action upon it, not against *Roberts*, but against the other directors. They filed a bill for discovery, alleging want of consideration. *Freeman's* defence was, that he gave consideration for it by means of a cheque upon his bankers. A motion was made that *Freeman* might be ordered to produce the bill of exchange and the cheque. The Vice-Chancellor granted the motion as to the cheque, but refused it as to the bill of exchange. [The *Lord Chief Baron*.—There, the only case made was, that the bill was indorsed without consideration; and, therefore, there was no occasion to look at the bill. Here, it is alleged that in the pleadings at law there is a count on the promissory note, and a count on the account stated. Now, to give evidence on the account stated, there is no occasion to produce the note before the jury, and you might get a verdict without it. It is contended, however, for the plaintiff, that though the ac-

(a) Not reported.

counts are *prima facie* evidence against him; yet upon an inspection of them and of the note, he might be able to make out a case of fraud. Suppose, upon the hearing, the plaintiff adduces sufficient evidence for me to refer it to the Master to see whether this was a fair account, you must then produce the note in the Master's office.] If we went into the Master's office upon the settled account, and the Master was of opinion that the accounts were not binding, it would be optional with us to produce the note. However, the case made by the plaintiff's bill is not that of a settled account impeachable for fraud, but that of an unsettled account. The defendant by his answer denies that the note has been paid.

1836.
 PILKINGTON
 v.
 HINSWORTH.

The LORD CHIEF BARON.—I think the plaintiff has a right to see the note. I must not take answers to be conclusive in all cases. They are so for certain purposes, but not for others.

Motion granted.

GOMPERTZ v. BEST.

Jan. 11th.

THE exceptions to the defendant's answer having been overruled with costs (a), the plaintiff, being in contempt for non-payment of those costs, obtained an order to dismiss his own bill.

Contempt of Court for non-payment of costs cannot be waived by the parties.

Mr. *Elderton*, for the defendant, moved to discharge the order so obtained, with costs.

Mr. *W. Rudall* resisted the motion, on the ground that the plaintiff had waived the contempt by filing a cross bill. He cited *Edmond v. Ross* (b), and *Levi v. Ward* (c).

(a) Ante, p. 114.

(b) 9 Price, 5.

(c) 1 S. & S. 334.

1836.

GOMPERTZ

v.
BEST.

The LORD CHIEF BARON was of opinion that this was not an irregularity which could be waived.

Order discharged, with costs.

Jan. 15th.

BEST v. GOMPERTZ.

Demurrer under circumstances, overruled with full costs.

UPON obtaining the order to dismiss his bill as above stated, the defendant in the present suit filed his bill in *Chancery* against the plaintiff, impeaching some only of the transactions (a) which he had in this Court endeavoured to set aside for fraud. To the bill in *Chancery*, the present plaintiff pleaded a former suit depending, and his plea was submitted to. To the bill in this Court, he filed a cross bill, for discovery of matters necessary to complete his defence in the original suit. The defendant answered the cross bill in part only, demurring as to the rest. Having afterwards abandoned his demurrer, which was of great length—

Mr. *Elderton*, for the plaintiff, moved that it might be overruled, with full costs.

The LORD CHIEF BARON ordered the demurrer to be overruled, with costs to be taxed by the Master.

(a) Ante, p. 116.

1835.

TOLDERVY *v.* COLT and Others.

(*Before the* LORD CHIEF BARON, PARKE, B., ALDERSON, B., *and* GURNEY, B.)

1835,
Nov. 16th,
18th.
1836,
Feb. 26th.

THE Court having, upon the motion for the production of the deeds and documents in this cause (*a*), decided in favour of the plaintiff's title, a motion was made in her behalf, on the authority of *Stitwell v. Williams* (*b*), that a receiver might be appointed of the rents and profits. But inasmuch as the application was founded on title alone, and not on any alleged fraud or spoliation on the part of the defendant, the Lord Chief Baron was of opinion that the Court could not interfere at that period of the cause. His Lordship, therefore, ordered the motion to stand over until the hearing; and considering the will, on which the plaintiff's claim depended, to be one of difficult construction, and to involve a question of some importance, he directed that the cause should be heard before the full Court.

The cause now came on for hearing. The defendant, Sir John Colt, gave in evidence the marriage settlement of Mr. and Mrs. Colt. By this settlement, dated the 30th of November, 1782, and reciting the will (*c*) of James Bowman Clarke, the freehold property in question was conveyed by the trustees, Toldervy and Davis, to certain uses

Testator devised his real estates to trustees upon trust that his daughter *M.* should, until twenty-one, if sole and unmarried, receive thereout an annuity of 60*l.*, and that she should thereafter and until thirty-one, if sole and unmarried, receive a further annuity of 40*l.*; but in case his said daughter should marry without the consent of his trustees, then she should only receive an annuity of 50*l.*, and the said estates should immediately upon such marriage be in trust for the children of *M.*, as tenants in common in tail; and for default of such is-

sue, in trust for the testator's sister *S.*: provided, that if *M.* should marry with the consent of the trustees, it should be lawful for them to settle the estates upon *M.* and her husband for their joint lives and the life of the survivor, with remainder to the issue of *M.*, in such shares as the trustees should appoint, and in default of such appointment in such shares and proportions as were therein-before limited. *M.* married with the consent of the trustees (upon which occasion a settlement was made pursuant to the will) and died without issue:—*Held*, (reversing the decision, *ante*, p. 240), that the remainder to *S.* was conditional, depending on *M.*'s marriage *without* consent; consequently, that *M.* having married *with* consent, the remainder to *S.* failed, although *M.* died without issue.

The Court will not, before the hearing of the cause, appoint a receiver of the rents and profits of real estate, on the mere ground that the party making the application has a good title; no fraud or spoliation being alleged against the party in possession.

(a) *Ante*, p. 240.

(b) 6 Madd. 49.

(c) See *ante*, 240.

1835.
TOLDERVY
v.
COLT.

therein mentioned, until the marriage; and after the marriage, to the use of Mr. and Mrs. *Colt* for their joint lives, and the life of the longest liver of them, but not without impeachment of waste; with remainder to trustees to preserve the contingent remainders; with remainder to the use of all and every the child and children of Mr. and Mrs. *Colt*, to be equally divided between or among them, if more than one, share and share alike, as tenants in common in tail, with benefit of survivorship; and if there should be but one child, or all but one should die without issue, to the use of that one child in tail. By the same indenture the leasehold property was made subject to limitations, as similar as possible to the limitations in the freehold estates.

Mr. *Temple* and Mr. *Wilcock*, for the plaintiff.—It will be contended, on the other side, that the testator's daughter, under the circumstances which have occurred, took the estate absolutely, and that the ultimate remainder to his sister, *Sarah Toldervy*, under whom the plaintiff claims, depended only on the daughter's marrying without consent. It is clear, however, from the will, that the testator meant to give his daughter a very limited interest. He disposes of the whole of the estate to the trustees: he makes them owners of the fee with very important powers—namely, of consenting to his daughter's marriage, and distributing the property amongst her children. With respect to the power of consent, it is remarkable, that during the life of *William Toldervy* it is given to him alone, though he was the husband of the testator's sister. The daughter was to have no power whatever of intermeddling with the estate. The testator, in fact, gives her no part of the estate—no part even of the rents and profits specifically, but only an annuity out of them; and her children take as tenants in common in tail only in the event of the trustees not exercising the power of distribution in their favour. Then, notwithstanding the provi-

1835.

TOLDERVY

v.
COLT.

sion made for the daughter's marriage with consent, the testator devises his remainder in the property at *White-chapel* to his two sisters. That shews that, although his attention had been drawn to the event of a marriage with consent, he still looked to his sisters as the ultimate takers of the estate. No one can look at the latter part of the will without seeing that it is connected with the original devise. The provision as to the daughter's marriage with consent is introduced not as a substantive devise, but only as varying the interest of the daughter in the estate, giving her still a limited interest, which is made impeachable of waste. After this provision in reference to a marriage *with* consent, power is given to the trustees to increase the daughter's allowance in case she should remain *single* until thirty-one, and this is followed by a provision for the maintenance of the children in case of a marriage *without* consent. The whole must, therefore, be looked upon as one general devise. The intention was to give a limited interest to the daughter for her life, and to make provision for her issue, if she should have any; but if she should have none, to give the fee absolutely to the sisters. The testator contemplated the marriage of his daughter as unlikely; though in case such an event did happen, he thought it right to provide for her issue. To support the defendants' case it must be contended, that there was a time when the daughter might have had the whole estate settled on herself. [*Alderson, B.*—Suppose she arrived at thirty-one, and did not marry, what interest would she take?] In terms there is no interest given to her in that case, but there is enough in the will to have enabled the trustees to have made her a provision. It is clear, however, that she was not to have the absolute interest, for her estate is restricted in every case. It will be said, that by our construction, the heir-at-law is disinherited. Where there is a complete devise of the estate, no particular regard is paid in equity to the heir-at-law. The Court will look simply to the construction of the will,

1835.

TOLDERVY
v.
COLT.

without favouring any party. [The *Lord Chief Baron*.—The doctrine has long been exploded, that the heir-at-law has any particular privilege or favour from the Court. *Alderson*, B.—What he has is a clear *prima facie* title, which you may shew to have been taken away.] Where the whole estate is devised, the Court will look to the will without favour to any party. [The *Lord Chief Baron*.—If there be a devise over to a stranger, and no intermediate devise, there will be a resulting trust in equity for the heir-at-law.] Where the testator devises part only of his estate, the Courts have said that they cannot make a will for him, and the heir-at-law takes the undevised part; but where the testator has made, legally, a complete devise, he has done all that the law requires; the heir-at-law is disinherited, and nothing is regarded in a Court of equity but the bare construction of the will: *Falkland v. Bertie* (a). Now, here it was the manifest intention of the testator to devise his whole estate, and the devise to the trustees is complete. Besides, the testator's general intention must prevail, even against express terms which are inconsistent with that intention: *Synge v. Hales* (b), *Thelluson v. Woodford* (c). In *Sherratt v. Bentley* (d) the late Master of the Rolls carried this doctrine so far as to reject the words "heirs, executors, administrators, and assigns," in favour of the general intention of the testator. *Colhoun v. Thompson* (e) is a case involving the same principles. Supposing, therefore, the proviso as to the daughter's marriage with consent to be in any degree repugnant to the rest of the will, it must yield to the general intent. The two provisos, however, as to the daughter's marriage, are not inconsistent with each other; inasmuch as they shew the time at which the children's interests were to vest. If the daughter married *without* consent,

(a) 2 Vern. 333.

(d) 2 Myl. & K. 159.

(b) 2 Ball & B. 508.

(e) Beat. 242.

(c) 4 Ves. 227.

the children were to take immediately; if *with* consent, they were not to take until after the death of the daughter and her husband. That is the fair interpretation of these provisoes; and where there is a reasonable ground for the use of particular words, they must be confined to that ground. It is clear, upon the construction of this will, that, whether the marriage turned out to be provident or improvident, the children were to stand in the same situation except as to time; and if there were no children, the estate was, in either case, to go over to the sisters. *Mac-
kinnon v. Sewell* (a).

1835.
TOLDERVY
v.
COLT.

Mr. Knight, Mr. Preston, and Mr. Cooper, for the defendant, Sir John Colt.—The testator was a careful and affectionate father. By his will he provides most anxiously for his daughter; and it is plain that he intended to prefer his own posterity to any other class of persons. Not that he cared to preserve his own name, for his will is that of a man who knew that his daughter, who was the object of his care, was his heir-at-law and sole next of kin. He knew that what he did not dispose of, his daughter, as his heir-at-law, must ultimately obtain. There are several general rules which will be of material assistance in construing this will. *First*, that no Court is at liberty to depart from the grammatical or legal construction of the instrument, without an evident necessity, arising from the apparent intention of the testator, deduced from the whole will. [*Parke, B.*—I have always thought that the best language in which that rule can be laid down is that of Mr. Justice Burton, in *Warburton v. Loveland* (b), where he applies it to the construction of statutes.] *Secondly*, that in construing a will of any obscurity, not merely the events which have happened, but those which might by reasonable possibility have happened, must be taken into

(a) 2 Myl. & K. 202; C. P. Coop. 224.

(b) 1 Huds. & Brooke, 648.

1835.
 TOLDERVY
 v.
 COLT.

consideration. *Thirdly*, that the heir-at-law has a *prima facie* right, and you must shew a title paramount to him, before you can take any thing from him. *Fourthly*, that although in general it is to be presumed that a man sitting down to make his will does not intend to die intestate, yet this rule admits of exceptions; more particularly where the individual who would take in case of his intestacy is an object of notice in his will. *Fifthly*, that regard must be had to the governing motive, or predominant feeling of the testator; and that though effect must be given, if possible, to all the words of the will, yet obscure words are never to be extended to bear on a subject foreign to the general intention.

In considering the effect of the will, let us first suppose that it contains no power enabling the trustees to make a settlement on the daughter's marriage with consent, and secondly, that it contains such a power. On the first supposition the construction of the will is plain. The testator gives the whole estate to the trustees upon certain trusts. Now, an equitable limitation, whether created by will or not, is subject to the same rules of construction as a legal limitation. The only exception is in the case of an executory trust: *Jervoise v. Duke of Northumberland* (a), *Garth v. Baldwin* (b), *Sanders on Uses*, cap. 3, sect. 5. Supposing the will to rest here, the daughter takes every thing, except she marries without consent. The words are, "And from and immediately after the marriage of my said daughter without such consent as aforesaid, I will, direct, and devise, &c.; that is to say, the testator neither wills, directs, nor devises, till after a marriage has been had without consent. It is clear, therefore, that upon the grammatical construction of the will, the ultimate limitation to the sisters depends solely on the condition that the daughter marries without consent. Then the legal

(a) 1 J. & W. 570.

(b) 2 Ves. sen. 646.

questions to be considered are those which have occurred in many other cases—namely, whether a condition or contingency affecting one portion of a series of limitations ought to be carried on to the other limitations of the series; and also, whether an ultimate limitation, which, strictly speaking, depends upon the failure of a prior limitation, ought to be let in where the prior limitation never comes into effect at all.

Upon the first question, the case of *Davis v. Norton* (a) is a decisive authority; and the principle of that and similar cases is clearly summed up in the words of Mr. *Fearne* (b)—“The construction in these cases, as to the restriction of the contingency to the estate first hinged upon it, appears to depend on the testator’s apparent intention not to extend it further. For wherever there is no apparent distinction in view in this respect, between such estate and those which follow it, the contingency, it seems, will equally affect the whole ulterior train of limitations.” The other leading authorities on this point are *Doe d. Watson v. Shipphard* (c), and *Denn d. Radclyffe v. Bagshaw* (d). Then, as to the second question, the rule is, that where the limitation over depends on a conditional clause involving several events, and it cannot be reasonably supposed that the devisee was not to take in one case more than in another, the limitation over may take effect, though some of the previous events provided for have not occurred: *Murray v. Jones* (e), *Jones v. Westcomb* (f), *Gulliver v. Wicket* (g), *Williams v. Chitty* (h), *Holmes v. Cradock* (i), *Parsons v. Parsons* (k), *Simpson v. Vickers* (l), *Humberstone v. Stanton* (m). The case of

1835.

TOLDERVY
v.
COLT.

(a) 2 P. W. 390.

(b) Conting. Rem. 235.

(c) 1 Doug. 75.

(d) 6 T. R. 512.

(e) 2 Ves. & B. 313.

(f) 1 Eq. Ca. Abr. 245, pl. 10.

(g) 1 Wils. 105.

(h) 3 Ves. 545.

(i) 3 Ves. 320.

(k) 5 Ves. 578.

(l) 14 Ves. 341.

(m) 1 Ves. & B. 385.

1835.

TOLDERVY
v.
COLT.

Mackinnon v. Sewell was one of the same nature. It was decided on the principle that you cannot infer it to be a testator's intention to give property over if the children of *A.* should die under twenty-one, but not to give it over if such children never come in *esse*. In that case, therefore, it was held, that there having been merely a defective specification of all the modes in which the previous limitations might fail, the limitation over must take effect, notwithstanding the previous limitation had failed in a manner not expressly provided for. But the principles on which that and other cases of the same class were decided are clearly not applicable to the present. In this case the governing motive of the testator was to prevent an improvident marriage by his daughter. With that view he limits her interest in the property, previously to her attaining thirty-one. No provision whatever is made for her attaining that age unmarried; and it is clear that if that event had occurred, the rents would have belonged to her as heiress-at-law of the testator. The testator has evidently left a portion of his property to be dealt with by the law. He makes no provision as to the rents between the time of his daughter arriving at thirty-one and dying unmarried. Suppose she had not married, why is it to be presumed that after thirty-one she was not to have the disposal of her property? The argument on the other side would have been equally applicable in the case of her not marrying at all. [The *Lord Chief Baron*.—Suppose she had married without consent, and had no children.] Whether they died, or never came in *esse*, would make no difference, provided she married without consent. On that event alone the interests of the sisters depend. When that takes place, the estate is fixed, and becomes subject to a series of limitations, which exhaust the fee.

Thus far the argument has proceeded on the supposition that the will contains no power enabling the trustees to

settle the property, in the event of the daughter's marriage with consent. But after protecting his daughter against an improper marriage, it occurred to the testator that a case might arise in which she might marry respectably, but in which the trustees might think a settlement prudent. She might marry a man in trade, or a very young man. He therefore gives the trustees power to make a settlement in that event, though he by no means makes it imperative upon them to do so. In this power he cautiously leaves the reversion undealt with, instead of settling it to the previous uses. Now, without evident necessity, which does not exist in this case, the previous limitations of the reversion cannot be transposed to this place. But then it is argued, that in whatever way the limitations to the issue fail, the sisters must take. Suppose the daughter had married with consent, and the trustees had omitted to execute the power of settlement, and she had left issue—according to the plaintiff's argument, the issue, who could have only taken under the settlement, (the words "so that" governing all the succeeding clauses), would have lost the estate. That, however, is so far from being the case, that their mother would have taken the fee. [*The Lord Chief Baron*.—Suppose the marriage had been with consent, and no settlement made, the estate would go to the wife, and to the husband for her life. But the trustees are not authorized to settle the property on them without making him impeachable of waste. That presents a doubt whether the words "it shall and may be lawful" are not imperative.] Take the case as it stands.—A settlement was in fact executed with the consent of the trustees, and confined to the issue of the marriage with Mr. *Colt*. Suppose he had died, leaving Mrs. *Colt* surviving him, without issue—would there have been a power of making another settlement? The power would have been exhausted; and consequently, according to the plaintiff's argument, the issue of a second marriage could not be

1835.

TOLDERY

v.

COLT.

1835.
TOLDERVY
v.
COLT.

provided for. [*Parke, B.*—A Court of equity would have relieved against such an execution of the power.]

To return to the main point in this cause.—The contingency of the daughter's marrying without consent pervades and governs the whole of that clause which contains the limitation to the sisters. The doctrine of conditional limitations has been well settled ever since *Holcroft's case* (a). The rule that governs them all is, that the Court will never construe words to be words of conditional limitation, except to effect the undoubted intention of the testator; and that if the words are those of condition, they must be so construed, unless there be a clear intention to the contrary, to be gathered from the whole will. (*Powell on Devises, by Jarman, Vol. 1, p. 197*). We therefore contend that the marriage of the daughter without consent was the strict condition on which alone the sisters were to take; that there is nothing in the will repugnant to this construction; that a contrary construction might, if there had been issue, have defeated that issue; and that such a result was directly at variance with the intention of the testator.

Mr. Johnes for the children of *James Bayley Toldervy*.

Mr. Stinton for the heir-at-law of the surviving trustee.

Mr. Temple, in reply.—There can be no doubt that it was the intention of this testator to guard his property from being thrown entirely into the hands of his daughter. It has been said, that if she arrived at thirty-one unmarried, she would have taken the fee. That cannot be inferred from the general tenor of the will. The testator meant to give his daughter no more than a life-estate, though with such additional advantages as, under the cir-

(a) *Moore*, 487.

1835.
TOLDERVY
v.
COLT.

cumstances, he thought it right to give her. He took care, however, that under every circumstance she should not be enabled to dispose of the fee. Her children were to be provided for, whether the marriage took place with or without consent; but, on the other hand, the estate was not to go out of the family. It is contended, that if she had married with consent, and no settlement had been made, the issue could not have taken at all. That is not the true construction of the instrument. In no event could the issue fail to take a beneficial interest, even if there had been more marriages than one. Perhaps if the clause containing the power of settlement had terminated at the words "direct and appoint," the issue might have been at the mercy of the trustees; but it goes on, "and for want of such direction, limitation, or appointment, in such shares as are hereinbefore limited respecting the same." In default of a settlement, therefore, they would take as tenants in common in tail. [*Alderson*, B.—The defendant's counsel read the clause thus: "And so that in default of such direction or appointment, the trustees shall convey," &c. You read it, "and in default of any conveyance by the trustees, the estate shall be in such shares," &c. *Parke*, B.—Every thing that follows "so that" is a description of the settlement, if they make it.] Even upon this construction, if the trustees had died without exercising the power of appointment, the children would have had a right to come in and claim the estate as tenants in common in tail. The cases cited on the other side are almost all distinguishable from the present. In that of *Davis v. Norton* (a), the condition so clearly applied to all the devisees, that they could not explain it away. Upon the principles of *Murray v. Jones* (b), and *Jones v. Westcomb* (c), this is a conditional limitation to the sisters, and not merely a gift upon condition.

(a) 2 P. W. 390.

(b) 2 Ves. & B. 313.

(c) 1 Eq. Ca. Abr. 245, pl. 10.

1835.

TOLDERVY
v.
COLT.

At the close of the argument, Mr. *Preston*, with reference to the question whether the power of settlement, in case of a marriage with consent, was imperative on the trustees, mentioned *Brown v. Higgs* (a), and *Duke of Marlborough v. Lord Godolphin* (b).

PARKE, B., observed, that having on a former occasion expressed an opinion in favour of the plaintiff upon the construction of this will, he felt himself bound to say that, after hearing the arguments advanced for the defendants, he was inclined to retract his former opinion. He should, however, give the case his best consideration.

Feb. 26th.

The LORD CHIEF BARON now delivered the judgment of the Court.—This was a bill filed for the purpose of obtaining possession of an estate which the plaintiff claims under a clause in the will of Mr. *James Bowman Clarke*. The case came before me first upon a motion for the production of papers and title-deeds; and upon that motion I was certainly of opinion that the plaintiff was entitled to the remainder in this estate upon the death of the testator's daughter. The will, however, was obscure, and of difficult construction, and I refrained from pronouncing any judgment upon it till I had consulted another member of the Court, my Brother *Parke*, to whom I sent it without any comment or suggestion whatever. He returned it to me in two or three days, with rather a strong opinion in confirmation of my own; and I in consequence delivered my judgment in favour of the claim of the plaintiff. The case was afterwards revived upon a motion for a receiver; and as the will was to be discussed, and the plaintiff's title to come under consideration a second time, I thought it expedient that it should be discussed before the full Court. The case accordingly underwent a very solemn and deliberate argument, and the Court have desired me to express their

(a) 8 Ves. 561.

(b) 2 Ves. sen. 61.

obligation to the counsel on both sides for their able, elaborate, and ingenious arguments upon that occasion. Many new lights were thrown upon the consideration of the subject, and some circumstances in the will were brought more distinctly to our attention than had occurred to me upon the first argument; and I am not ashamed to confess that I have drawn, upon the second argument, a conclusion at variance with that which I drew from the first. I am authorized by my Brother *Parke* to say the same thing for him. He, also, upon the second argument, found reason to change his opinion; and I have now to state the unanimous opinion of the Court in favour of the defendant, Sir *John Colt*.

1836.
TOLDERVY
v.
COLT.

Upon the first occasion I thought that there was no doubt, nor do I now doubt, that if the testator's attention had been called to the particular case which has occurred, and which gives rise to this question, he would have declared his intention to have been in favour of his sisters. The will still appears to me to be obscure, and no opinion which can be given upon it can be one of very great confidence. It is very much disjointed, the clauses are thrown about in very great confusion, and, in order to make them intelligible, the best mode is to collect the different members of it, and join them together. I have taken some pains to do so, and likewise to abbreviate many of the clauses; and it appears to me that when the various scattered provisoes and exceptions are put together, they will assume something of this form: —

The testator, Mr. *James Bowman Clarke*, bequeathed the whole of his estate, both freehold, leasehold, and personal, to *Toldervy* and *Davis*, whom he made his executors. He gave them power to receive the rents and profits; to mortgage the real estate, for the purpose of raising money for the payment of fines upon renewing the leasehold estates; to renew the leasehold estates; to invest the money raised, in new purchases of either leasehold or freehold property; to mortgage for the purpose of raising

1836.

TOLDERVY
v.
COLT.

money to accumulate ; and to invest the accumulations in new purchases, and in the mean time to deposit them in the *Bank of England*. In short, he gave them very great powers over this estate ; and declared them to be trustees for the objects of the will. The objects of the will are stated to be these: to the intent and purpose that his daughter *Mallett* should, till twenty-one, if sole and unmarried, receive annually the sum of 60*l.*; and from time to time thereafter, till she should attain the age of thirty-one, being still sole and unmarried, receive an additional annuity of 40*l.* Then there comes, very much disjointed from that bequest, in a remote part of the will, this proviso—"Provided that the trustees shall be authorized and empowered, not only during her minority, but at any time or times afterwards, till she arrives at the age of thirty-one, and so long as she is unmarried, but not otherwise, as they shall think fit, to pay and apply any further sums beyond the two annuities of 60*l.* and 40*l.* for her maintenance and education, or her advantage, so as they do not exceed the amount of the annual rents and profits." So that, in effect, this was giving to her these annuities at all events till she arrived at the age of thirty-one unmarried ; and, at the discretion of the trustees, giving her the benefit of the whole of the rents and profits till she came to that age, if she remained unmarried, but not otherwise. Now those words "*but not otherwise*" are very important, because they shew that if she married, the trustees were not to give her more than what was otherwise provided for her. Then there is a proviso that if his daughter should, either before or after thirty-one, marry without consent of the trustees, or the survivor of them, she should be paid an annuity for her life only of 50*l.*, and not the other two annuities of 60*l.* and 40*l.* before mentioned. "And from and immediately after the marriage of my daughter, without such consent as aforesaid, I direct that the said estates" (the first clause relates to the freehold estate, but

the subsequent parts of the will throw together the whole, and therefore I comprise the whole in one statement here) "shall be in trust for all and every the child and children of the body of my daughter lawfully to be begotten, in such shares and proportions, manner and form, as the trustees shall from time to time direct and appoint, with or without power of revocation; and for want of such direction, in trust for such child or children, equally to be divided between them, as tenants in common, and the several and respective heirs of the body of such child and children lawfully issuing, with cross-remainders; and if but one such child, then to that child alone, and the heirs of his or her body lawfully issuing." In default of issue of the children, the testator devises the property to his sisters. By a subsequent proviso, the testator directs that in case his daughter should marry without consent, and have issue, that issue should, at the discretion of the trustees, have a provision for their maintenance and education during their minority, out of the estate so bequeathed to them, until they should be respectively entitled to their respective shares of the property under the will.

These are the important parts of the will, with the exception of a proviso for the case of the daughter's marriage with consent, to which I shall now advert. That proviso is likewise placed in a remote part of the will, and gives to the trustees power to convey the estates to new trustees, upon the trusts there declared: and, supposing the conveyance to be made in pursuance of the proviso, the effect of it is to give an estate for life, with benefit of survivorship, to the husband and the wife, and then an estate tail to the issue of the body of the wife, as tenants in common, in such shares as the trustees choose to appoint; and in default of appointment, in such shares and proportions as before. But that clause is not followed by any limitation of the remainder after the estate tail. Upon the former argument, it struck me that the testator's in-

1836.

TOLDERTY

v.
COLT.

1836.

TOLDERVY

v.
COLT.

tention to provide for the sisters was very apparent. In the first bequest, he had devised the remainder expectant upon the estate tail in the children, to the two sisters; and I thought that he had a design to provide for his sisters this estate in remainder at all events. Although the will was expressed obscurely and ambiguously, it had occurred to me that by putting the proviso for the case of a marriage with consent into a place which I thought I could discover to be its proper place, that would remove all difficulties, and would effectuate the testator's intention, that the remainder to the sisters should take effect after the estate tail given to the children, either in the case of a marriage without consent, or a marriage with consent. That was the impression under which I certainly gave my first opinion; but upon the elaborate argument which we have had upon the subject since, I have seen reason to change that opinion.

Now, let us see what it is that the children take.—The estate is given to them expressly in case of a marriage without consent. The remainder is to take effect after that estate expires, and is dependent upon that estate, and no other. That is the first remainder, and it begins with the words, "and for default of such issue." Now, it is admitted on both sides, and I think it cannot be denied, that the word "issue" there, means issue of the children. It cannot mean issue of the daughter, because no estate tail is given to the daughter, nor, in that clause, any estate for life; and, therefore, a limitation to the sisters, after a general failure of issue of a person who was to take no particular interest, would have been too remote. What is given to the daughter, in case of her marriage without consent is, an annuity of 50*l.*, and nothing more; and immediately the children are born, they take estates tail, liable to be modified by any direction or appointment the trustees may make. If they make no appointment, they take estates tail, as tenants in com-

mon with cross-remainders. Then upon what does the remainder to the sisters depend? It depends upon that estate tail. If that estate tail is taken away, the remainder is taken away.

1836.
 TOLDERVY
 v.
 COLT.

The question has been argued on behalf of the plaintiff, as if the present ought to be ranged under that class of cases in which it is contended that the case of *Murray v. Jones* (a), and the more modern one of *Mackinnon v. Sewell* (b), are comprised. It has been said, that those cases are an authority for the proposition, that the Court will not, where it is contrary to the apparent intention of the testator, allow a condition, which in words may appear to be a preliminary condition of vesting the estate, to operate upon all the limitations following that condition. Now, it appears to me, that that is not the true character of those cases. Those cases do not furnish questions upon the operation of a condition upon subsequent limitations, but they are mere constructions of the condition itself. The case of *Murray v. Jones* arose upon the will of Lady *Bath*. The person who drew her will used a multitude of unnecessary words, for the purpose of giving to Mrs. *Fawcett* the personal estate, in case Lady *Bath* should not have any second child that arrived at the age of twenty-one, or, being a daughter, married before that age. The drawer of the will had perplexed himself by putting all possible cases, when he meant to state only one case, namely, her having no second child who should arrive at the age of twenty-one, or daughter who should marry before that age. Sir *William Grant*, who decided that case, put it upon the true ground. He said, she meant to give the estate to Mrs. *Fawcett* and her children, in case she, the testatrix, should have no daughter or son that arrived at the age of twenty-one. Why, she had no children at all; therefore, she had none that

(a) 2 Ves. & B. 313.

VOL. I.

(b) 2 Myl. & K. 202; C. P. Coop. 224.

T T

EQ. EX.

1836.

TOLDERVY
v.
COLT.

arrived at the age of twenty-one. Therefore he interpreted the condition, however obscurely expressed, to include the case of her dying without leaving any children; and he made use of this remarkable expression:—"that if there were any gradations in the performance of the condition, she had more than performed it;" for, whereas she meant to give the estate over, if she had no child that arrived at the age of twenty-one, as she had left behind her no child at all, therefore she had not one that arrived at the age of twenty-one. He illustrated that further, by shewing that, in another part of the will, in declaring who should be the ultimate object of her bounty after Mrs. *Fawcett* and her children, in case they failed to exist, she makes provision, if she herself should leave no children behind her, and Mrs. *Fawcett* should leave no children behind her, that then the estate should go to a third party. That clearly shews, that her intention was to give the estate to Mrs. *Fawcett* and her family, in case she, Lady *Bath*, should die without leaving any children. It is perfectly plain, therefore, that that was the interpretation of the condition itself, shewing what the condition meant; and therefore, that no question could arise there of a condition operating upon a subsequent limitation. The condition did operate on a subsequent limitation; and there the condition was what the Master of the Rolls interpreted it to be, and not, as the other party contended, that she should actually leave a child living after her death; that was no part of the condition. The case of *Mackinnon v. Sewell* was one precisely of the same nature, and therefore requires no further observation.

On the other side, it was argued by the counsel for the defendant, that this case ranges itself under that class of cases in which a rule of construction, founded on plain common sense, has been illustrated, namely, that where a condition precedes a certain series of limitations, each of that series must be taken to be affected by that condition,

1836.

TOLDERVY

v.

COLT.

unless there is a manifest intention upon the face of the will to be collected to the contrary; that is to say, in other words, you follow the plain grammatical construction of the will in giving effect to the limitations, unless you find by some other parts of the will that the testator's intention was to deviate, in any one particular, from that plain grammatical construction. The question, then, is, whether the condition upon which the estate tail is limited to the children, does not also apply in this will to the limitation in remainder to the sisters. It appears to me, upon the words of the instrument, that it clearly does. But I think it is hardly necessary to go into that class of cases to determine the construction of this will, as far as it depends on that first and second limitation, because, as I before observed, the estate tail is given to vest in the children immediately as they are born, and is given upon the express condition of the marriage of the mother without consent, and therefore the remainder over is made to depend upon that estate tail. Why then, if you take that estate tail away, what becomes of the remainder? Now, if it were legitimate to transfer the proviso for a marriage with consent, immediately after the limitation to the children upon a marriage without consent, and to make it part of the same sentence, then undoubtedly the limitation to the sisters over would depend upon the one estate tail as well as upon the other; and if it depended only upon that, I own I should have had the courage, in order to meet the apparent intention of the testator, to have transferred the proviso in that manner, under the authority of several cases well known to gentlemen who are in the habit of considering these subjects, in which the opinion, rather widely laid down by Mr. Justice *Buller*(a), has, however, been acted upon; where he says that the Court may mould and transpose the clauses of a will, for the purpose of

(a) 2 T. R. 223.

1836.

TOLDERTY
v.
COLT.

giving effect to the intention of the testator. But I find this extraordinary fact in this will—I find a clear case in which the sisters could by no means have any remainder at all, and that is this: the testator has provided for his daughter till she arrives at the age of thirty-one unmarried; and he has provided for her also if she marries before or after thirty-one; but if she remains single from thirty-one to the day of her death, the only provision made for her is a provision by law; there is no provision by this will. It was argued in that case that he must be supposed to intend to die intestate. I do not think he intended any such thing; but a man may, without intending to die intestate, in effect make no provision at all but what the law makes. It appears to me a confusion of ideas to say that a man intends to die intestate when he makes a will, because he probably intends to devise every thing; but it happens very often that he omits to make a particular devise; and if it is a *casus omissus*, a Court of law cannot supply it afterwards. Now, then, suppose the daughter had never married at all, why the object of the trusts given to the trustees being to provide for a particular person, the daughter, her children, her husband, and, in one case, for the persons in remainder, who are specified in the will, if she does not marry at all and dies unmarried, there is an end of their trust, except that which the law raises for the benefit of the daughter. What estate, then, does she take? Not an estate for life—she takes no particular estate—and therefore no remainder can depend upon her life. She takes no estate tail, and therefore no remainder can depend upon that estate. She clearly takes an estate in fee, liable, if you please, to be divested by her marriage, with or without consent, after thirty-one; but yet, if she remains unmarried after thirty-one, and dies, it is clear that she dies seised of an equitable estate in fee-simple in all these premises; and it goes, therefore, to her heir-at-law, or may be bequeathed by her will.

There is one case, therefore, where clearly the testator has omitted to make any provision for his sisters at all, or to give any such estate as could support any remainder to the sisters. Well, then, it is asked, and I think very properly asked, as one case of that sort was plain, manifest, and incontrovertible, why should not the other case also of a marriage with consent be ranged under the same class of cases either of a design to die intestate, if you please so to put it, or of a *casus omissus*; and why should you supply it in one case more than the other? It is very remarkable that in the proviso for a marriage with consent, the estate tail is given to the children in a different manner. The first estate tail vests in them the moment they are born. They take as purchasers in both cases; but in the first case they take the estate tail from the moment they are born. But in the other, the estate is given to the husband and the wife for life, and for the life of the survivor; and then, the estate tail depending on that estate for life, goes to the children. Undoubtedly that would make no difference, if it were followed either in words or by construction, with a remainder over to the sisters. But that proviso for a marriage with consent is followed by no such remainder to the sisters. Now, where shall I put it in the will? What right have I to say, as I first thought I had, that I can put it before the limitation of the remainder to the sisters? Suppose he himself had inserted it in the will at an earlier part: he might still have put it after that remainder. If he had so done, the same difficulty would have occurred as occurs now, though placed after it at a greater distance. I cannot say, therefore, that he intended that the limitation to the sisters of a remainder dependent on a particular estate tail, granted upon a certain condition only, was to follow the estate tail granted upon another condition, and in a different part of his will. If I were asked my opinion of the intention of the testator, if the case had been suggested to him, I should say, that

1836.

TOLDERVY
v.
COLT.

1836.

TOLDERVY

v.

COLT.

if he had been told, " You have made a provision for your sisters in case of a particular marriage without consent ; but in the other parts of your will you have left no provision for them, as to your estates bequeathed to your daughter : " I should think it very probable indeed he would have said—" Then fill up that omission, and give them the remainder again. " But a Court of justice has no right, in interpreting a will, to make a probable conjecture of what a testator would have done in a particular case, and then to do it for him, when there are no words in the will to justify that course. We are bound to find out the intention of the testator ; and, though that intention be expressed obscurely or ambiguously, yet if it is expressed in words some how or other, or expressed by so strong an implication, that you cannot avoid seeing he contemplated the thing and meant it, though he has not expressed it accurately ; in that case you are bound, if you can find such intention expressed in the will, to give effect to it, and very often to mould and modify the estate in such a way as to give effect to the intention that he either clearly has expressed or intended to express. " But if the words do not express any such intention, it is not because you can conjecture such intention to be highly probable, that you are to insert words in order to give effect to it. The testator has not done what he probably would have done, had the case occurred to him ; but if he has not done it, a Court of law has no right to do it for him. It therefore appears to me that we cannot, by anything but a probable conjecture, which, in my opinion, the Court has no right to act upon, insert this proviso immediately before the limitation over of the remainder to the sisters. And if we cannot do that, then the limitation over to the sisters clearly depends upon the conditional estate tail given to the children ; and as that conditional estate tail never existed in the case that has occurred, of course the remainder falls to the ground.

I ought to state, that it is the opinion of some of the

1836.

TOLDERVY

v.
COLT.

Judges, and, for aught I know, of all of them; certainly, two have expressed it to me, that the proviso for making a settlement in the case of a marriage with consent was not imperative upon the trustees. I own that I myself do not entirely concur in that opinion. I am inclined to think, that, although the words used in that proviso are, "it shall and may be lawful," the trustees would probably have been compelled, if the necessity had arisen, to make that conveyance, or to hold the estate in trust for the children. That depends on a class of cases of which *Brown v. Higgs* (a) is a leading authority in modern times. Upon that, and other cases of the same nature, I think it cannot be doubted, that where an apparent power is combined with a trust, if the power is not executed, a Court of equity will execute the trust in some manner; and therefore, that if the trustees in this case, supposing children to have been born after a marriage with consent, had omitted to make any conveyance at all, a Court of equity would have allowed the children to have had the benefit of that clause in the will, considering it as a trust combined with a power. However, the judgment of the Court in this case must be given without reference to that interpretation; because, as the other Judges are of opinion that it was a matter of mere discretion in the trustees, if they are right in that opinion, there can be no doubt at all that the plaintiff could have no claim. But the ground upon which we are all agreed in giving judgment for the defendants is this, that we think we cannot indulge in conjecture for the purpose of introducing one proviso into another place than that where it exists in the will, and into that precise place which would make it give effect to the limitation over of the remainder to the sisters. We think we cannot do that but by conjecture, which we have no right to indulge in; and upon this ground the bill must be dismissed.

Decree accordingly.

(a) 8 Ves. 561.

1835.

GLYN

v.

SOARES.

neither *Donna Maria*, nor any person on her behalf, had given any consideration for the bills; that, nevertheless, after such pretended indorsement by *Couto*, the bills in question had been remitted to *Soares*, that he might recover the amount thereof for the use of *Donna Maria* and her Government, and that he had for that purpose commenced his action against the plaintiffs; that *Outrequin & Jauge* had given notice to the parties liable on the bills not to pay the amount to any agent of *Donna Maria*.

The bill charged that the action was virtually that of the Queen of *Portugal*, *Soares* being merely her agent; that the queen and her agents had divers documents in their custody, by which the want of title of the Queen and her Government to the bills would appear, and that in setting up any title thereto, they acted in fraudulent concert together; that *Outrequin & Jauge* never agreed to raise, and never in fact raised any loan for *Donna Maria* or her Government; and that in remitting the bills to the treasury of *Portugal* they did not mean to make them payable to *Donna Maria* or any agent of hers, or to any person not acting under the authority of *Don Miguel* or his Government; that *Couto*, before the date of the pretended indorsement in his name, had been dismissed from his office of treasurer by a public decree, issued by *Don Pedro* for that purpose; that if he ever in fact subscribed his name to any special indorsement of the bills to *Soares*, he was compelled to do so by duress and by threats of imprisonment and loss of life; that in fact he never indorsed them, and that the pretended indorsement was written on the second parts of the bills after he had subscribed his name; that the Queen never intended to recognise the loan or pay the bondholders; that she had personal knowledge of, and had divers communications with her agents and ministers relative to many of the circumstances stated in the bill, and that she withheld from *Soares*, with

1835.

GLYN
v.
SOARES.

his Government ; that amongst the proceeds of the bonds so remitted were six bills of exchange, drawn by Baron *d'Est* of *Paris* upon the plaintiffs, and made payable to the order of *Outrequin & Jauge* ; that these bills were made in two parts, of which the first parts were remitted by *Outrequin & Jauge* to their agents, *Gower & Co.*, in *London*, to be presented to the plaintiffs for their acceptance, and the second parts were remitted by them to the Treasury of *Portugal* with this indorsement:—" Pay to the order of the Treasurer-General of the Royal Treasury of *Portugal* value in account of the negotiation of the Royal Loan of *Portugal* ;" that the first parts of these bills were duly accepted by the plaintiffs, not on their own account, but in the course of their banking business, and as agents for *Richardson*, who kept a banking account with them ; that the second parts were duly received some time in *June*, 1833, by *Joachim Fernandez Couto*, as the agent of *Don Miguel* and his Government, and as *Don Miguel's* Treasurer of the Royal Treasury of *Portugal* ; that upon the evacuation of *Lisbon* by *Don Miguel's* troops, on the 24th of *July*, 1833, *Donna Maria* was proclaimed Queen of *Portugal*, and shortly afterwards *Don Pedro* and his adherents, on behalf of *Donna Maria*, assumed the government of *Portugal* ; that *Don Pedro* and his adherents seized and took possession of the second parts of the six bills of exchange, and caused each of them to be indorsed to the defendant *Soares*, who was a mere agent of *Donna Maria* ; and that the indorsement on each bill purported to be signed by *Couto*, and to bear date the 7th of *August*, 1833, which was after *Couto* had ceased to be treasurer of *Don Miguel's* Government, and while he was in fact not treasurer of *Portugal*, either under *Don Miguel's* government or otherwise ; that the loan so raised, and the bonds issued by *Don Miguel*, had been expressly repudiated by *Donna Maria*, who had declared all the acts of *Don Miguel* to be null and void ; that

1835.

GLYN
v.
SOARES.

respecting *Couto*, the defendant gave no information further than that he believed the indorsement on the bills to have been signed by *Couto* while he was Treasurer of *Portugal*, and under the authority of *Don Pedro* as Regent of *Portugal*. Upon the other matters charged in the bill, he gave no material information. He concluded by submitting that the Queen had been improperly joined as a defendant in this suit, and that she was not a party to the action.

The Queen of *Portugal* not having appeared to the bill, the plaintiffs, on the 19th of *November*, obtained an order that service of subpoena on *Soares* or his attorney in the action at law might be good service on the Queen of *Portugal*. A motion was now made, on the part of the defendant *Soares*, to discharge that order.

Mr. *G. Richards* and Mr. *Roupell*, in support of the motion, contended, that this being a mere bill for discovery, the order which had been obtained was contrary to all practice; and that, even in cases where relief was prayed, the Court was unwilling to substitute service on the party's agent for service on himself: *Bond v. Duke of Newcastle* (a), *Anderson v. Lewis* (b), *Smith v. Hibernian Mine Company* (c), *Roberts v. Worsley* (d). They then proceeded in a line of argument similar to that which was afterwards adopted on the argument of the demurrer of the Queen of *Portugal*; contending, that the order for substitution of service was nugatory, on the ground that the Queen of *Portugal*, not being a party to the record at law, ought not to have been made a party to the bill for discovery; that no instance could be produced of such a proceeding, and that the cases where the assured are made parties to bills by underwriters were distinguishable

(a) 3 Bro. C. C. 385.
(b) Id. 429.

(c) 1 Sch. & L. 238.
(d) 2 Cox, 389.

from the present, because the assured might be considered as parties to the record at law. In the course of the argument they cited *Richardson v. Soares* (a).

1835.
 GLYN
 v.
 SOARES.

Mr. *Simpkinson* and Mr. *J. Russell*, *contrà*, contended, that it was clear from the answer of *Soares*, that he was the agent of the Queen of *Portugal*; if he were not, he could in no way be affected by substitution of service on the solicitor. That being so, the Queen's admissions might be used by the plaintiffs in equity, as a defence to the action at law; *Hanson v. Parker* (b), *Harrison v. Vallance* (c); that a bill for discovery was necessary to obtain this evidence, and would lie against the Queen as the real, though not the nominal, plaintiff in the action; that the cases of bills by under writers against the assured afforded a precedent for such a bill; that if the bill were sustainable, the order for substitution of service was proper, for that when the plaintiff at law is out of the jurisdiction, substitution of service on his attorney at law will be ordered to be good service, in every case where the bill is filed as a defence to the action, whether by injunction or otherwise: *Smith v. Hibernian Mine Company* (d).

Mr. *Richards* in reply.

THE LORD CHIEF BARON.—The question between the parties is shortly this—whether a party suing at law, not *proprio jure*, but as agent for another, though in his own name, by any principle which is acted upon in this Court, should be restrained in his action until the party for whom he acts puts in his answer to a bill of discovery. Now, Mr. *Richards* not only contends that, admitting that to be the practice of the Court in the case of an action on a policy, the names of the parties interested

(a) Nom. *Glyn v. Soares*, 3 Myl. & K. 450.

(b) 1 Wils. 257.

(c) 1 Bing. 45; 7 Moore, 304.

(d) 1 Sch. & L. 238.

1835.

GLYN

v.

SOARES.

appear on the record, and consequently it is known who is the real party concerned—but he goes a step farther, and calls the assured a party to the record. That is not so. The assured is no more a party to the record than any other person is a party whose name is mentioned in the declaration; no more than the drawer of a bill of exchange is a party in an action brought by an indorsee against the acceptor. There was no occasion, till it was required by statute, that the names of the assured should be inserted on the record at law; and it is new to me, to hear that, before discovery is granted in a Court of equity upon a bill of this nature, you must look to the record at law to see whether that may act as an estoppel against the party seeking the inquiry. I always understood that the practice of Courts of equity upon questions of this nature was not so strict as that of Courts of law. Certainly a Court of law does not consider the record at law an estoppel, except as between persons who are parties to the record.

Then, on what is the practice founded, that if an agent bring an action on a policy, this Court will grant an injunction against him, and also against the party for whom he brings the action? If it could be shown that, before the statute, this Court could, upon no principle, have entertained a bill for an injunction against the party interested, I should think myself bound by such a rule; but no such rule or practice appears to have existed. On the contrary, it appears to me, that where a party brings an action not *proprio jure*, but on behalf of another person who is in possession of facts of which a discovery is necessary for the defendant in the action, the latter has a right to file a bill against that person, as if he were actually the plaintiff at law; and I can conceive no other principle on which the practice existed of compelling the plaintiff at law, in an action on a policy, to abstain from proceeding in his action. Why, then, not apply that prin-

1835.

GLYN
v.
SOARES.

inciple to an action brought on a bill of exchange or other security? It is objected, that, without proceeding to file a bill of discovery against him, the party may be made a witness, and that a bill for a commission to examine witnesses will answer all the purposes of a bill of discovery. But that may apply in cases where a party is interested in a policy; yet that argument has not been used, or has not prevailed against this sort of order, as applied to the case of the assured. Nothing, again, is more common than actions brought on bills of exchange by a party who has no interest—a banker for instance. Now, suppose an action had been brought on a bill by a banker as the agent of another person, the bill being specially indorsed to the banker, if you will, (for that will make no difference,) and suppose it appeared that the party for whom the banker was employed was a customer living abroad, and that what that customer had said, written, and done in reference to the bill, formed the defence at law; I see no principle of discovery which should not apply to such an individual living abroad, as well as to an assured on a policy. Suppose, for instance, that he had signed a settled account at *Paris*, that that document had been left there in his custody, and that he had afterwards sent the bill to his bankers in *London* for the purpose of the action—would there be any colour of justice in saying that the acceptor should be allowed to make that defence at law, but not to file his bill to compel the party at *Paris* to produce that document on which his defence rested? Suppose the bill were filed merely against the agent here; he would only say that he knew nothing about it. Again, suppose the party abroad refused to be examined as a witness; what remedy would the defendant at law have, but a proceeding of this nature in a Court of equity? A deed in the custody of the other party might be a complete defence to him; yet there would be no means under a commission to compel the production of it, or to examine the party as a

1835.

GLYN

U.

SOARES.

213

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411

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been good. Lord *Redesdale* said—"The Court has indeed substituted service in several cases where the party may have notice of the proceedings, and where, in case he goes out of the way, there is a person whom he has named in Court as his agent, and whom the Court can look on as such. But a person named agent for a different purpose cannot be looked on in that light." It is quite clear, therefore, that if that person had brought the action for the benefit of his principal, the very bringing that action would have made him agent in that particular thing, and then the service upon him would have been good.

Upon the whole, the case appears to me to depend on a plain and clear principle, and that the practice ought to be applied where the principle may be applied. I think, therefore, that the order must stand.

Motion refused.

Dec. 16th.

The foregoing motion having been refused, the Queen of *Portugal* demurred to the bill on two grounds—*first*, that she was not a party to the record at law, and therefore not a proper party to the bill for discovery; and, *secondly*, that if the matters inquired after by the bill were true, they would afford no defence to the action.

Mr. *Cresswell*, Mr. *G. Richards*, and Mr. *Roupell*, for the demurrer.—*First*, the Queen of *Portugal*, not being a party to the action at law, ought not to be made a defendant to this bill. If the bill had been filed against the

Don Miguel, as King of *Portugal*, effected a loan for the use of his Government by the issue of certain bonds, the consideration for which was paid in bills of exchange drawn upon certain bankers in *England*. The bills were made in two parts, of which the first parts were remitted to *Eng-*

land, and accepted by the bankers, and the second parts were remitted to the Treasury of *Portugal*, being specially indorsed to the Treasurer of the Royal Treasury of *Portugal*, on account of the loan. After the dethronement of *Don Miguel*, the second parts of the bills came into the possession of *Donna Maria's* government, and were, by her orders, indorsed by her treasurer (the same individual who was treasurer under *Don Miguel*) to *S.*, resident in *England*, with instructions to recover the amount due thereon, and remit the same to the *Portuguese* Government. *S.* having brought his action on the bills against the acceptors, and a bill in equity having been filed by the acceptors against *S.* and the Queen of *Portugal*, for a discovery of the circumstances under which *S.* obtained the bills:—*Held*, upon demurrer by the Queen—*first*, that she was a proper party to the bill for discovery, although not a party to the record at law; and, *secondly*, that if the bills came into her possession by fraud, and were indorsed by her agent to *S.* under circumstances of duress, that was a defence which the acceptors, in the action brought against them by *S.*, were at least entitled to urge for the opinion of a court of law.

1835.

GLYN
v.
SOARES.

The Court refused the motion, on the ground that no declaration having been delivered, there was nothing to shew that the party was really interested. The Court thought that; until there was something on record to shew who were the parties really interested, a Court of equity could not interfere.

1835.
 GLYN
 v.
 SOARES.

But further, assuming that *Soares* is agent for *Donna Maria*, or that he is in some manner bound by her acts, there is nothing in this cause to prevent her being made a witness. The plaintiffs may have her evidence as well as her answer, your Lordship retaining the injunction till the evidence is produced. They have no right to make her a party without first shewing that her evidence as a witness is inadmissible. *Fenton v. Hughes* (a) is an express authority to shew that a bill for discovery against a mere witness is not sustainable. [The *Lord Chief Baron*.—Are not the assured equally capable of giving testimony? and yet they are made defendants.] There is no instance where, in an action on a policy, an assured has been called to give evidence for the defendants. A party to the record cannot be called upon to give evidence for either side. [The *Lord Chief Baron*.—In some cases parties to the record have been allowed to examine each other by consent. The late Lord Chief Justice *Mansfield* carried this practice to a very great extent; perhaps, indeed, too far. An assured, however, is not a party to the record, and I should say that in an action on a policy he may be called as a witness by the defendant on the record. A Court of law regards no parties as incompetent, with reference to the record, except those who are parties to the record: *Bauerman v. Radenius* (b). The assured being named in the record is only made necessary by statute (c). If an executor brings an action to recover monies due to the testator's estates, can it be

(a) 7 Ves. 287.

(b) 7 T. R. 663.

(c) 19 Geo. 2, c. 37. See 16 East, 143.

1835.

GLYN
v.
SOARES.

doubted that any person interested under the will, as for instance one of the residuary legatees, may be called by the defendant for the purpose of proving a settlement of accounts? Now, suppose an act of Parliament passed enacting that the name of a party so interested should be inserted in the record; would that make any difference in his competency as a witness?] In such case we submit that the defendant, having the advantage of the statute, ought also to suffer the corresponding disadvantage. But, independently of principle, the authorities are strong to shew that a bill of discovery in aid of a defence at law can only be sustained against the parties to the record at law. In *Few v. Guppy* (a) an action was brought for the infringement of a patent. The plaintiff in the action was a trustee to whom the property in the patent had been assigned. The defendants at law filed a bill against the trustee for a discovery and production of the papers in aid of their defence. Upon a motion to produce those documents, Lord *Lyndhurst* held that the trustee was under the same obligation to produce them as if he possessed both the legal and beneficial interest; observing that it was not possible that the *cestui que trusts* could be plaintiffs in the action, nor was it possible that they could be made defendants to the bill of discovery, for the bill being brought in aid of the defence at law could be filed against none other than the plaintiffs in the action. [The *Lord Chief Baron*.—There is an evident distinction between a trustee, regularly constituted, and a person who is only called a trustee from the position in which he stands. Many of the rules of equity will apply to the one, which will not apply to the other. I remember, in a case in the Privy Council, Sir *William Grant* adopting that distinction. Here, you call *Soares* a trustee for the Queen of *Portugal*, but he is not so with all the incidents of trusteeship.]

(a) Hare, on Discovery, 124.

There may be some distinction between the case of an ordinary trustee, and that of a person who is made a trustee against his will, but *Soares* is not shewn to be in that situation; and, therefore, the general rule applies. In the cases in which witnesses have been made parties, as in *Plummer v. May* (a), relief has been prayed against them. [The *Lord Chief Baron*.—That was a remarkable case. It was a bill to set aside a will in this Court, and the subscribing witnesses, who had no interest, were made parties.] It was a bill for relief, because costs were prayed against the witnesses as parties to a fraud. The same thing occurred in *De Beauvoir v. Rhodes* (b). On the other hand, to a bill merely for discovery, the parties must be parties to the record at law: *Mitford, Pl.* (c); *Shackell v. Macaulay* (d). Such a bill is ancillary to an action at law, and enables the parties to examine each other, which they cannot do at law. *Carvell v. Watkins* (e) shews that it is only appendant to an action, and cannot lie independently of it. Where the bill is filed in aid of an action, not only must an action be pending or intended, but a good ground of action must be shewn; for, unless the evidence sought would, if used, assist the legal claim of the party seeking it, a Court of equity will not grant the discovery. A suit for discovery, therefore, is a *quasi* trial in this Court, and the merits must be entered into. In *The Mayor of London v. Levy* (f) the plaintiffs averred that they had a right of action against the defendants, or some of them; but this allegation was held to be too vague, inasmuch as some of the defendants might be mere witnesses, against whom there could be no right to file such a bill. That case, therefore, but more especially *Fenton v. Hughes* (g), are authorities for this demurrer. In the latter case, Lord *Eldon* observed, that though in some instances the exa-

1835.

GLYN

v.

SOARES.

(a) 1 Ves. sen. 426.

(d) 2 Sim. & Stu. 79.

(b) Not reported.

(e) 5 Madd. 18.

(c) P. 156, (3rd edit.); p. 188, (4th edit.)

(f) 8 Ves. 398.

(g) 7 Ves. 287.

1835.

GLYN
v.
SOARES.

mination in this Court might be better than at law, yet that would not alter the general rule upon the subject. In truth, the interference of a Court of equity does not extend to aid the process at law, but only supplies it where it does not exist. Policy cases are an exception to the rule, more on practice than principle. No doubt, the assured may be joined in a bill of discovery, but that is an anomaly in the law; and in *Shackell v. Macaulay* (a) Sir John Leach said, that underwriting cases were not to be reasoned upon as furnishing general rules. But, even admitting that this case is to be governed by analogy to those of policies of insurance, no interest is averred in the *Queen of Portugal* by this bill.

The second ground of demurrer is, that the matters in respect of which discovery is sought would, if true, afford no defence to the action. In 1833, *Outrequin and Jauge*, at *Paris*, sold certain bonds or scrip, which professed to secure to the holders of them certain sums and interest, to be paid by the Government of *Portugal*, *Don Miguel* being then *de facto* king of that country. The parties who purchased these bonds knew the precarious nature of their security, and took their chance as to the consequences. By the sale of these bonds, *Outrequin and Jauge* realized considerable sums of money, which were remitted to the agent of the *Portuguese* Government, by means of bills. Some of these bills, which are the subject of this suit, were drawn by Baron *d'Est* upon *Richardson's* agents, in favour of *Outrequin and Jauge*, Baron *d'Est* having a private demand upon *Richardson*. The bills were accepted by *Richardson's* agents, who are the plaintiffs, and, as there is no allegation to the contrary, they must be taken to be acceptors for value. They have no right to inquire in the action whether the holder has given value for the bills. Whoever may be ultimately entitled to the proceeds of the bills, *Soares* is not only

(a) 2 Sim. & Stu. 87.

1835.

GLYN
v.
SOARES.

authorized, but bound, to obtain payment from the acceptors. It may be another question who is to obtain payment from *Soares*. The first parts of the bills were remitted to Messrs. *Gower*, to be delivered to the party who should produce the second parts. The second parts were made payable, and indorsed to *Couto*. Is it to be said, that no person can be entitled to these bills, or can compel payment of them, but *Don Miguel* or his Government? Has he any right to them, as the representative of the *Portuguese* Government? Clearly not. It is not said that they were indorsed to his personal agent, but to the treasurer of the Government, for the use of the Government. *Don Miguel's* Government no longer exists; but is the acceptor thereby discharged? If so, he is fortunate, for he has received value for the bills. On the contrary, *Couto* having, as he was bound to do, indorsed these bills, and received the proceeds as the representative of the Government to which they belonged, *Soares*, who now holds them, is entitled to receive the proceeds as against *Richardson*; and the latter cannot enter into an inquiry as to the value which *Soares* gave for them.

But then it is said, that *Donna Maria* has got *Couto* to indorse these bills as Treasurer-General, when, in fact, he was not so. If the present Government be a lawful one, it is entitled to the funds belonging to the old Government. If there had been no contest, and *Don Miguel* had died, these bills would have belonged to his successor, not to his executor. [The *Lord Chief Baron*.—I assume that the Government is lawful; but the Queen has declared the contracts of her predecessor unlawful.] If *Donna Maria* is not the lawful owner of these bills, it will be for the Court to determine who is. The Government is entitled, unless the bills are indorsed to some one else. They are indorsed to *Soares*. If he has given value for them, they are his; if not, he is trustee for the *Portuguese* Government. They remain the property of the Government, until

1835.

GLYN

v.

SOARES.

it is shewn that the Government has parted with them. *Soares*, therefore, in any view of the case, is the lawful holder. This is not a case of failure of consideration, as between the acceptor and the other parties to the bill, so as to prevent the holder from recovering against the acceptor. Suppose even that the Queen says that she will not recognise the loan, or pay the bonds; no bond-holder can interfere. They bought the bonds, and received their consideration; they contracted with their eyes open, and knew that there were chances that the Government would be disturbed. They paid their money to *Outrequin* and *Jauge*, who laid out that money in the purchase of these bills. Then, how is the question at law affected by any consideration as to whether the Queen will pay these bonds or not? They who advanced their money on these bonds have no interest in the question. It lies solely between *Richardson* and *Soares*. Suppose the Court were to hold that the action should be stayed for ever; the bond-holder could have no remedy against *Richardson*. Why, then, should *Richardson* be protected? *Jones v. Fort* (a) is an authority to shew that *Soares* has a right to sue, even though he may not have a right to receive the profits of these bills. He received the bills from *Couto*, who was agent of one Government or the other; and it lies on the plaintiffs to shew that *Couto* had no authority to indorse. [The *Lord Chief Baron*.—A party may do an immoral act in obedience to his Government. Suppose the justice of the transactions in *Portugal* to be doubtful, and that it is doubtful how far they may or may not operate as a defence at law; under such circumstances of doubt, ought the demurrer to be allowed?] If these parties accepted the bills for value, and received from the Government the security which the latter professed to give, they can have no defence at law to an action brought by the

(a) 9 B. & C. 764; 4 M. & R. 547.

holder. The holder has no connexion with the acceptor. [The *Lord Chief Baron*.—Suppose a person makes a mortgage, and the mortgage money is advanced by means of bills drawn on the mortgagee's banker; and suppose, before the bills become due, that the mortgagor is divested of all legal title, and some other person, whose title is paramount, ejects the mortgagor, and refuses to ratify the mortgage. In the mean time the bills get into the hands of the agent of either the ejector or mortgagor, and he brings actions against the acceptor. If the parties were all before a Court of equity, would the Court allow either the mortgagor or the ejector to receive the money?] The Court is not dealing with the equities between the parties. Whether *Soares* is liable to some other person, is at present wholly immaterial. If this had been a bill for relief, it might have been shewn that the Queen was not entitled to the money; but the bill is not so framed. At law, therefore, *Soares* has only to shew that his are the legal hands to receive the money; and any thing relating to the equitable interest can be no defence to such a claim. The judgment of the Master of the Rolls proceeds in a great measure on these principles, and justly; for if the equitable interest does not entitle a party to be a plaintiff, how can it entitle him to be a defendant? [The *Lord Chief Baron*.—You say there is no defence at law. Suppose a bill of exchange is remitted to a steward, for the use of his master, after the steward has been discharged, and suppose that before it becomes due he indorses it away, without giving or receiving any value for it; cannot the acceptor set this up as a defence in an action on the bill? The rule of law is, that felony and fraud will not change the title to property.] The bill alleges no case of fraud; and the plaintiffs do not sue as bond or scrip-holders, but merely as bankers, who, in the ordinary course of business, have given valuable consideration for the bills. They allege that they are ready to pay the proceeds to either one in-

1835.

GLYN

v.

SOARES.

1835.

GLYN

v.

SOARES.

dividual or the other, and they might in fact have filed a bill of interpleader for that purpose.

Mr. *Simpkinson* and Mr. *James Russell*, for the bill.—*Outrequin* and *Jauge* were not the mere agents of *Don Miguel*. The bill states that they contracted the loan; that the scrip and bonds were transmitted to them by *Don Miguel* and his Government; that in consideration of that they procured bonds from certain individuals on account of the intended loan, and that they also in their own behalf took part of these bonds. They remitted to *Don Miguel* the amount of the loan in bills of exchange, comprising the six which are the subject of this cause. Having purchased these bills for value, they indorsed the second parts specially as payable to the order of the Treasurer-General of the Royal Treasury of *Portugal*, on account of the loan. These parts, therefore, were transmitted for the particular purpose and consideration stated in the indorsement. The contract was for *Don Miguel*; and the question will be, whether, the loan being contracted for him and his Government, and the bills remitted for that purpose, any other Government, unless it recognises the acts of *Don Miguel*, can avail itself of the benefit of this loan. It is clear that the case of a prince or a Government is not different from the case of individuals, with respect to any equities arising out of a transaction of this nature. Now, the whole of the circumstances connected with this loan have been repudiated by *Donna Maria*. The consideration for these and other bills was scrip, payable with half-yearly interest; and it may be admitted that the acceptors having received value for the bills, it would be immaterial to them whether the holder gave value for them, provided he obtained them legally. But the question is, whether the case is so clear that the Court will say that it is perfectly nugatory to grant a discovery in aid of the defence to this action. The bill contains

1835.

GLYN
v.
SOARES.

charges shewing the agency of *Soares*, the circumstances attending the indorsement by *Couto*, (more especially as to the date of the indorsement being subsequent to his dismissal), and also the circumstances attending the seizure of *Lisbon* by *Don Pedro* and his adherents. These charges would give rise to many important questions. One question would be, whether the indorsement by *Couto*, payable only to the order of the Royal Treasurer of *Portugal*, could give a right to sue to any subsequent holder of them, even supposing that the Government of *Donna Maria*, though it repudiated the acts of *Don Miguel*, had continued *Couto* in his office. Another question would arise as to the validity of the indorsement, upon the suggestion that, if indorsed by *Couto* before the 7th of *August*, he was then under threats and duress. Supposing that not to be the case, another question might arise upon the hypothesis that the bills were indorsed by *Couto* before the 7th of *August*, and retained by him in his possession, but afterwards seized and negotiated by the Government of *Donna Maria*. These important questions are sought to be raised by the bill, which likewise charges that the action of *Soares* is in fact that of *Donna Maria*; that she has no interest in the bills which are the subject of that action; that she and her agents are in possession of many documents from which her want of interest would appear, and that she withholds that material evidence. Then, are the two grounds which have been mentioned sufficient to support this demurrer?

As to the first ground, the observations made by your Lordship on the former occasion have not been displaced. It is said to be against the principles of a Court of equity to give discovery against any party who is not a party to the record at law. But no case, with the exception of that in *Mr. Hare's* book, bears out such a proposition. No doubt, a bill cannot be filed against a mere witness, except in certain cases, because the same evidence can be

1835.

GLYN
v.
SOARES.

obtained at law as by a bill of discovery. But there are certain exceptions to this rule referred to in *Mitford* (a); and in any case where, from the peculiar circumstances, a complete discovery cannot be had at law, the rule altogether fails. One of the excepted cases is, where a clerk or secretary to a corporation is made a defendant, though having no interest: *Wych v. Meal* (b). Another is, where the assured are made parties to bills of discovery brought by underwriters. Before the statute passed requiring the interest of the assured to be averred on the record at law, the action might have been brought by the mere agent of the assured, who knew nothing of the case. Can it be contended that the statute is the foundation of the principle on which the assured are made parties in equity? To support that argument, the Court must be satisfied that, before the statute, bills by underwriters against the assured were not tolerated. There is no authority, however, for such a proposition. The case in *Fowler* (c) only proves that the Court will ascertain for what purpose the action is brought before it will grant discovery. If the rule contended for on the other side be inflexible, it was unnecessary for Lord *Eldon* to state any other reasons for not allowing a bill to be filed against a mere witness, than that he is not a party to the record at law. Instead of that, he enters at length into the practice in these cases. It has been said that, in *Few v. Guppy* (d), Lord *Lyndhurst* laid it down as a clear general proposition, that *cestui que trusts* could not be plaintiffs in an action, and therefore not defendants to a bill of discovery. But, first, it was not necessary in that case to come to that conclusion; and, secondly, if his Lordship's observation is to be treated as a general one, it must be applicable to the case of underwriters, as well as any other. The case itself, however, was peculiar

(a) Mitf. Pl. (3rd. edit.) 152,
(4th edit.) 188.

(b) 3 P. W. 310.

(c) *Angerstein v. Wentworth*,
1 Fowl. 227.

(d) Hare, on Discovery, 124.

in its circumstances. The bill was filed by the *cestui que trusts* and trustees of a patent, praying for the usual accounts, and an injunction against a party who was alleged to have infringed the patent. A cross-bill of discovery might then have been filed against the trustee and *cestui que trusts*, but that course was not adopted. A motion was then made for an injunction, and Lord *Lyndhurst* retained the bill, giving liberty to the plaintiffs to bring an action at law. The action was brought in the name of the trustee only, as having the sole legal interest; and, upon the motion of the defendants at law for the production of the documents, in aid of their defence, the Vice-Chancellor doubted whether the order could be made as against the *cestui que trusts*. Upon application, however, to Lord *Lyndhurst*, he ordered the trustee to produce the documents, on the ground that the *cestui que trusts* having concurred in and adopted the action, which was brought for their benefit, it was not competent for the trustee to object that they were not made parties.

The general rule contended for is not better supported by principle than by authority. Suppose the case of a bond, assigned for valuable consideration, and that after the assignment the assignee receives payment from the debtor, and retains in his possession certain documents from which the fact of payment would appear. Suppose that the assignee, notwithstanding the payment, brings an action on the bond against the debtor, in the name of the assignor; is the debtor not to be at liberty to file his bill against the party claiming to be beneficially entitled, calling upon him to discover those documents by which the payment of the debt could be proved? Even Courts of law will make a distinction between the real and nominal plaintiff, and will not allow the nominal plaintiff to release the action: *Legh v. Legh* (a), *Anon.* (b), *Payne v. Ro-*

1835.

GLYN
v.
SOARES.

(a) 1 B. & P. 447.

(b) 1 Salk. 260.

1835

GLYN
P.
SOARE

[REDACTED]

vernment cases would differ in this respect from those of individuals; but the case of *The King of Spain v. Hullet* (a) refutes that proposition. Then, suppose this case—that *A.*, a private individual, by fraud or force obtains possession of a security given to *B.*, another private individual, on which security the party to it will be liable to *B.*, provided *B.* performs his part of the contract: can it be argued that *A.* acquires such an interest in the security as to entitle him to sue upon it? He can only have such an interest (if at all) by adopting the consideration. He cannot repudiate the consideration, and yet sue the party as liable to himself, on the mere ground that he is liable to somebody. The plaintiffs in this case admit their liability, but say that they are not liable to the defendants. They say that *Outrequin* and *Jauge* were the parties to whom they gave the bills, and from whom they received the value, and that *Outrequin* and *Jauge* were the contractors for the loan, and had a running account with *Don Miguel* and his Government in respect of these bills. They expressly charge that, when *Outrequin* and *Jauge* remitted these bills to *Portugal*, they did not mean to remit or make them payable to any other Government than that of *Don Miguel*; and moreover, that *Outrequin* and *Jauge* have given them notice not to pay these bills to any person claiming under *Donna Maria*. Admitting, therefore, their liability to *Outrequin* and *Jauge*, or, at all events, that *Outrequin* and *Jauge* have an interest in the bills sufficient to warn them against paying the money due upon those bills, the plaintiffs nevertheless contend that the defendants are not entitled to receive that money.

Mr. *Cresswell*, in reply.—*Outrequin* and *Jauge* were no more interested in these securities than consignees are interested in goods which are consigned to them for sale,

(a) 7 Bligh, N. R. 359; 1 Clark & Fin. 333.

1835.

GLYN
v.
SOARES.

1835.

GLYN

v.

SOARES.

with directions to invest the proceeds, and remit them to the consignor. There is no allegation in the bill that they were contractors for the loan, but only that they were employed to regulate it for *Don Miguel*. There are, however, allegations which strongly tend to shew that the price which they had given for the bills were repaid to them by means of the negotiation of the bonds. The circumstance that they themselves subscribed part of the money will not alter their negotiation. It is not stated that any part of the money was specifically appropriated to the purchase of these bills. They were mere agents, who had no interest in the question, and the notices which they have given, not on their own behalf, but on that of *Don Miguel*, prove that fact. In the case put by your Lordship of a bill remitted to a steward on his master's account, and indorsed by the steward after his discharge, it might certainly be asked, in an action against the acceptor, what authority the steward had to indorse. The only mode of deciding that question here is, by determining whether *Don Miguel* or *Donna Maria* is entitled to these bills; and your Lordship will take upon you to say whether a Court of this country will try that question. [The *Lord Chief Baron*.—*Donna Maria* may be Queen of *Portugal*, and yet not entitled to recover on these bills.] She is entitled to recover, unless it can be shewn, which it is not, that *Conto* indorsed these bills unlawfully. They belong to the Government of *Portugal*, and not to *Don Miguel* personally. The nature of the bonds was to secure certain payments by the Government. They were the consideration for these bills; the proceeds of the bills must belong to that Government from whom the consideration moved, whether *Don Miguel* or *Donna Maria* be at its head. [The *Lord Chief Baron*.—If the Queen does not mean to fulfil the contracts of the Government, can she succeed at law?] She has a legal title against the acceptor, there being no failure of consideration as between the

indorsee and the acceptor. Suppose a party draws a bill on *A.* in favour of *B.*, in consideration of a bond given to a third person, and *A.* accepts the bill: if the payee indorses it, although the obligor of the bond should afterwards become insolvent, or say he will not pay it, that will afford no defence to the acceptor in an action on the bill by the holder. An acceptor who has had value cannot take advantage of such a circumstance.

The object of a bill for discovery being to gain evidence, the plaintiffs should have come into this Court under circumstances which would have enabled them to read the answer of the Queen of *Portugal* against *Soares* in the action at law. They, however, state no facts entitling them to that advantage: and hence this case is distinguishable from that of *The Bishop of London v. Fytche (a)*. There the patron declared on his presentation of a particular clerk. He therefore identified himself as to that presentation with the clerk. There is no parallel connexion between the defendants to this bill. Besides, there, both the parties demurred; the plaintiff at law thereby admitting the truth of the charges in the bill. Here, the plaintiff at law does not demur, and, consequently, makes no such admission. The case of *Wych v. Meal (b)*, which has likewise been cited in support of the first ground of demurrer, was a bill for relief and not discovery, or the demurrer would have been allowed. The true reason for making the officers of corporations defendants to bills in equity is, that a town clerk, or other responsible officer, is so much the agent of the corporation that all his acts would be evidence against them. There is no case, however, which decides that an agent of a corporation may, in all cases, be made a defendant to a mere bill for discovery: *How v. Best (c)*. The case of *The*

1835.

GLYN
v.
SOARES.

(a) 1 Bro. C. C. 96.

(b) 3 P. W. 310.

(c) 5 Madd. 19.

1835.

GLYN
v.
SOARES.

with directions to invest the proceeds, and remit them to the consignor. There is no allegation in the bill that they were contractors for the loan, but only that they were employed to regulate it for *Don Miguel*. There are, however, allegations which strongly tend to shew that the price which they had given for the bills were repaid to them by means of the negotiation of the bonds. The circumstance that they themselves subscribed part of the money will not alter their negotiation. It is not stated that any part of the money was specifically appropriated to the purchase of these bills. They were mere agents, who had no interest in the question, and the notices which they have given, not on their own behalf, but on that of *Don Miguel*, prove that fact. In the case put by your Lordship of a bill remitted to a steward on his master's account, and indorsed by the steward after his discharge, it might certainly be asked, in an action against the acceptor, what authority the steward had to indorse. The only mode of deciding that question here is, by determining whether *Don Miguel* or *Donna Maria* is entitled to these bills; and your Lordship will take upon you to say whether a Court of this country will try that question. [The Lord Chief Baron.—*Donna Maria* may be Queen of *Portugal*, and yet not entitled to recover on these bills.] She is entitled to recover, unless it can be shewn, which it is not, that *Couto* indorsed these bills unlawfully. They belong to the Government of *Portugal*, and not to *Don Miguel*. The nature of the bonds was secure certain by the Government. The consideration of these bills; the proceeds must belong to the Government from whom the negotiation moved. *Don Miguel* or *Donna Maria* is not its head. The Lord Chief Baron.—The contracts of the acceptor, the

upon her. I did not mean by that to anticipate any decision which might be made either as to the liability of the Queen of *Portugal* to become amenable to any process of any Court of judicature in this country, or to decide that a bill for discovery in this particular case would lie against her. I thought it not expedient, upon that preliminary application, to decide those questions at once in the negative, and thereby prevent all further inquiry; being, moreover, strongly inclined to think that, if the facts stated were true, on principle, and for the furtherance of justice, she ought to be compelled to answer. An application was afterwards made to set that order aside; and upon that occasion Mr. *Soares* did not deny, that, in bringing the action against the bankers, he acted exclusively as the agent of the Queen of *Portugal*. The fact, therefore, being established on both sides, that he did not prosecute the action *suo jure*, or for his own purposes, but for the mere purpose of handing the money to the Queen, I still thought, though I was not bound to decide finally or peremptorily on the subject, that, in this particular case, the Queen ought to make the answer; and I therefore refused the application. The order remaining in force, the Queen of *Portugal* put in a demurrer to the bill; and although a great part of the argument which was addressed to me upon the demurrer had been anticipated, still the questions, whether she was amenable at all to a court of justice in this country in respect of her regal capacity, or whether in this particular case she ought to be called upon to answer, were questions which might very properly be opened upon demurrer. That demurrer was argued with great ability; and in stating that my original opinion has not been shaken, (for I must still adhere to that opinion), I am desirous of laying before the bar the reasons that induce me to support the conclusion to which I originally came.

1836.

GLYN
v.
SOARES.

The bill states, that the bills of exchange were accepted

1836.

GLYN

v.

SOARES.

by the bankers. That the money lodged with them to pay these bills of exchange came from a Mr. *Richardson*. That he was the agent of Messrs. *Outrequin & Jauge*. That Messrs. *Outrequin & Jauge* were employed for the purpose of raising a sum of money by way of loan for *Don Miguel*, who was *de facto* King of *Portugal* at the time. That *Don Miguel* had given certain bonds, the effect of which was to pledge the Government of *Portugal*, as far as he could pledge it, to pay the interest and principal of that loan. That some of these bonds were handed over by Messrs. *Outrequin & Jauge* to certain persons, who paid for them; that others of them they kept themselves, making themselves not only agents, but parties, and as it were subscribers; and that with the funds which they had obtained from the persons to whom they handed the bonds, together with their own funds in part, they had purchased the bills of exchange as a means of making the remittances to *Portugal*. That the bills of exchange were given in sets or parts. That one part was transmitted to *London* for acceptance, the bills being drawn upon *London*, and the other part transmitted to *Lisbon*, indorsed, "To the Royal Treasury of *Lisbon*, on account of the Royal Loan of *Portugal*," or some words to that effect, denoting the purpose of the indorsement, and the fund to which they were to be applied. The bill further states, that, about the period when the bills of exchange had arrived in *Portugal*, *Don Miguel* had abandoned *Lisbon*, and that possession had been taken of it by *Don Pedro*, on behalf of his daughter, the present Queen of *Portugal*. It further suggests, that the loan being contracted apparently for the purpose of maintaining the power of *Don Miguel*, *Don Pedro* had published a proclamation, in which he gave notice that it was not his intention to ratify that proceeding; intimating in effect, that when his daughter became possessed of the

kingdom of *Portugal*, the mortgage or pledge which was made by the then *de facto* King of *Portugal* would not be regarded by his successor. It farther states, that, upon the arrival of *Don Pedro* and *Donna Maria* at *Lisbon*, a gentleman of the name of *Couto*, the royal treasurer under the appointment of *Don Miguel*, had been dismissed from his office, and a commission had been appointed to conduct the affairs of the Treasury. It suggests, that about that period the bills were lying in his office, with no indorsement upon them. These proceedings, I think, took place between the 31st of *July* and the 7th of *August*. It is suggested, that *Don Pedro* or his agents discovered that these bills were remaining unappropriated in the actual possession of *Couto*; and that they, either by fraud or force, persuaded or compelled *Couto* to indorse the bills, for the purpose of transmitting them to the agent of *Donna Maria* in *London*, who is the plaintiff at law, and the defendant in this suit. It then suggests other proceedings by *Don Pedro* of an official nature, and I may say of a legislative nature also, (because before the assembling of the Cortes of that country, the legislative as well as the executive power was vested in the sovereign), by which he again decreed that the loan should not be respected, and that the obligations entered into by *Don Miguel* were utterly void. I must take the bill, therefore, as making these allegations—that, at the time when these bills of exchange arrived in *Portugal*, the person who had been the official treasurer of *Don Miguel* was dispossessed of his office; that *Don Miguel* was driven from his kingdom, and unable to comply with his engagements; and that *Donna Maria*, who succeeded him, although she was able, was unwilling, and determined not to comply with them. So that the consequence would be, that if the amount of these bills were recovered now, the fund would be paid over to persons who had determined not to pay any consideration for them, or to comply with

1836.

GLYN

v.

SOARES.

1836.

GLYN

v.

SOARES.

the consideration for which the bills were given. This is the state of facts as raised by the bill.

To this bill there is a demurrer, and the demurrer is argued upon two grounds. The first ground is, that a bill for discovery to aid a proceeding at law, or a defence at law, cannot be sustained against any other person than the person who is either the defendant at law or the plaintiff at law; that if an action is pending, the parties to the bill for discovery must be the same as are parties to the record at law; and that if an action is not pending, but about to be brought, the plaintiff in equity must confine it to those persons against whom he is about to bring his action. These were the maxims laid down in argument, and which were said to be so well understood in a Court of equity as to admit of no dispute. The second ground of argument was, that the Queen of *Portugal* ought not to be called on to make an answer to this inquiry, inasmuch as the inquiry itself was unimportant; that it furnished no defence whatever to the defendant at law; that it could not be made use of in evidence, and that, therefore, on the ground of want of materiality, the bill for discovery should be dismissed.

With respect to the first ground, I entertained great anxiety, because the practice of the profession to which I have been most accustomed having been that of a Court of law, I felt that I ought to be cautious how, in opposition to the emphatic declarations of gentlemen of eminence at the equity bar, I ventured to dispute upon principle, and, as it were, upon my own authority, what was said to be a maxim of Courts of equity. I have looked through all the text-writers on the subject, and I find no such maxim. There is no one who can be called a text-writer (and there are many upon the practice and principles of equity), in which I can find it laid down as a rule that you must confine the inquiry to those who are parties at law. A practice, no doubt, might obtain so invariably,

1836.

GLYN
v.
SOARES.

that every text-writer on the subject might take it for granted, and therefore omit the mention of it; I am aware, for instance, that a foreigner, coming to observe the proceedings in courts of law in England has, in compiling a treatise on the subject, embodied in his book a number of points of practice which nobody ever thought of publishing before. That certainly is possible; but I have looked into the cases to see if I could find any dictum of any Judge in equity in which the maxim contended for has been laid down, and I find none, excepting in one case, which is contained in a very intelligent modern work—I mean Mr. *Hare's* work on *Discovery* (a).

Before I advert to that case I will consider the other authorities on the subject. I must own, that, upon a due consideration of them all, they seem to me not only to establish no such principle, but to establish a principle altogether distinguishable from it, and which goes the full length of supporting the decision which I am about to pronounce in this case. In the case of *Baleh v. Wastall* (b) it is reported to have been said by Mr. *Vernon*, in argument, that Lord *Nottingham* had decided that where a plaintiff had recovered judgment in an action of debt against an executor, and had issued a *fieri facias* upon that judgment, to which the sheriff had returned *nulla bona*—that in that case the plaintiff had a right to file a bill of discovery against the defendant, and also against any other person whom he had reason to suspect, and could shew in his bill probable reason to conclude, had concealed the assets of the deceased, for the purpose of discovering those assets in order to make them liable to his judgment. Now that, undoubtedly, is stated only in argument, but it is stated on the authority of Lord *Nottingham*. That case, or rather dictum, I believe, was not adverted to in argument before me; but as far as it goes, it is against the maxim insisted upon.

(a) P. 124.

(b) 1 P. W. 445.

1836.

GLYN
v.
SOARES.

In the case of *Wych v. Meal* (a), which was cited in argument, a bill was filed against the *East India Company* and their secretary for discovery; and the question was raised, whether, as secretary, he was not merely a witness, without any such interest of his own as could sustain a bill of discovery against him. However, the demurrer to that bill was overruled, and the reason given by the Chancellor was, that, as a corporation did not answer on oath, and could not be compelled on oath to produce documents, the consequence would be, that unless the plaintiff could have the oath of the secretary, who was to be presumed, as their officer, to have access to these documents, he would be without remedy. That case, therefore, establishes this principle, that even where a party has no interest, yet if it be necessary to the ends of justice that he should be liable to make discovery, a Court of equity will compel him to do so; the general rule at the same time being admitted, that you cannot file such a bill except against a party who is interested.

There is another case upon the same subject; *Moodalay v. Morton* (b). That was a bill against the *East India Company*, and *Morton* their secretary, for a commission to examine witnesses, and a discovery by whom and under what authority certain possessions which the plaintiff had in the *East Indies*, under what was called a cowl or lease of the *East India Company*, had been taken from him, he intending to bring an action against the Company for the damage done to him, but wishing for a discovery in the meantime, to ascertain how and by whose authority it was done, who were the individuals who had been employed to do it, and under what sanction they did it. To this bill there was a demurrer; and we may infer from the date of that case, that the Judge who decided that demurrer was Lord *Kenyon*, who was Master of the Rolls in 1784.

(a) 3 P. W. 310.

(b) 1 Bro. C. C. 469.

1836.

GLYN
v.
SOARES.

Lord *Kenyon* overruled the demurrer, and he stated that it was proper that the secretary should make answer; and then, upon an objection that no action had been brought, and therefore no bill of discovery could be filed, he makes this answer, namely, that actions against the *East India* Company, they being a corporation, must be by original; and the original writ in an action upon the case must set forth the whole grounds of the action, exactly in the same form as in a declaration. That most eminent Judge was a practised common lawyer, as well as a practised lawyer in equity; he knew perfectly well the distinction between original writs in certain forms of action, where the writs are merely technical, as in debt or covenant, and original writs in actions on the case; (because in actions upon the case, which were brought by original formerly, before the late alterations in process, the plaintiff was bound to set out the whole of his claim in the original writ as well as in the declaration); and Lord *Kenyon* says, in answer to that argument, he cannot bring his action, for he must sue by original; and unless he has the discovery he seeks, he cannot tell even how to frame his writ. His Lordship therefore overruled that objection.

A case was referred to from *Fowler's Practice* in the Court of *Exchequer*; that of *Angerstein v. Wentworth* (a). It was a case of this sort:—A writ had been sued out by a person of the name of *Wentworth*, but nothing had been done upon it: it was a mere writ sued out of this Court, and served upon certain underwriters. An application was then made, upon oath that *Wentworth* was a mere agent, and intended to bring an action on a policy, that he might accept a subpoena to appear for the party interested, who was represented to be living in one of the *South American* provinces, and against whom the bill was to be filed for discovery. The Court refused the motion, be-

(a) 1 Fowler, 227.

1836.

GLYN

v.

SOARES.

cause no declaration was yet filed. Now, that short note has been made considerable use of in the argument for the defendant. Why should the Court, it was contended, have refused the application in that case, unless they meant to say you can have no discovery except against a party to the record at law? Now, it appears to me that the use made of that short note is not justified by the case itself. In point of fact, if the party suing had been the party interested, one cannot say the Court would not have done exactly the same thing. All that had been done was to sue out a writ. The party might never proceed on that writ at all. If *he* had come to ask for assistance, in order to frame his declaration, that would have been another case; but the defendant in such a case comes *quia timet*; he cannot tell what the action is to be against him—he cannot tell whether any action will be brought at all. The mere suing out of the writ does not put him to any cost or expense; he cannot tell what is to be done upon it, and there may be very good reason therefore for saying, you come too early to institute any sort of proceeding here. It is not because a man has sued out a writ, that we must necessarily presume he means to follow it up. If he declares upon it, you will be in good time for your bill; if he does not follow it up, you may enter an appearance—he will discontinue it, and then you will have your costs at law. Why should you put the machinery of the Court of equity in motion before you are really hurt or threatened? It appears to me that this might be a good reason for refusing an application of that sort, without involving the supposed principle that there must be a party on the record at law before you can find out against whom to file the bill of discovery.

Another case cited for the defendant was that of *Shackell v. Macaulay* (a). Upon looking at that case, it does

(a) 2 Sim. & Stu. 79.

not appear to me to have any application. That was a case in which two actions had been brought at law by Mr. *Macaulay* for two different libels, which related to transactions in two different parts of the world. Mr. *Shackell* filed one bill only for a discovery, and for a commission to examine witnesses in both causes; and the difficulty there was how he could embrace these two causes, (which were quite separate causes of action, and the evidence as to which was to be taken from separate parts of the world), in one bill of discovery, seeking one commission, because there happened to be the same parties in both causes. The very judgment of the Vice-Chancellor in dismissing the bill was, that, supposing he granted the commission, the commissioners might examine witnesses in one cause in *Asia*, we will suppose, and that cause might be ready for trial, but yet you could not try it until the commission was completed in *Africa*, where another set of witnesses were to be examined, and that consequently it was absurd to tie up the plaintiff at law in that sort of proceeding: he ought, in fact, to have filed separate bills, and have sought separate commissions in each case. On that ground, and on that ground alone, the bill was dismissed; but whether the bill was dismissed or allowed, I do not see that it has any application to this case.

The case of *The Mayor and Corporation of London v. Levy* (a) was one, in which the Mayor and Corporation of *London* had filed a bill of discovery against some half dozen persons, in order to discover some fraud that was supposed to have been committed by them in respect of some scavage dues, and they stated that the defendants or some of them had committed the fraud, but the only case they stated applied to two or three of them, and one of them, according to their own statement, had nothing at all to do with it. He happened to be the partner of one

1836.

GLYN
v.
SOARES.

(a) 8 Ves. 398.

1836.

GLYN

v.

SOARES.

and be brought to give evidence in a Court of justice, himself being one of the fabricators of the fraud: on the contrary, justice may require a full disclosure of the facts by the parties to the fraud, before the action at law proceeds further. If they deny all interest and all conspiracy by plea, that gives rise to another question: but if the party who is charged with fraud and conspiracy is called upon to make a disclosure for the purpose of aiding the party at law, and he admits it by demurrer, it may then be a considerable question whether that is not such a species of participation—not pecuniary interest undoubtedly—but such a species of participation in some sort of interest with the devisees as to make him liable to a bill of discovery in a Court of equity. But, however, I am not bound to go that length; I am only suggesting that *Plummer v. May* has been made use of beyond the original intention of it, in several instances which are to be found on the records of Courts of equity in making mere witnesses to a will parties to a bill of discovery. An instance occurred very recently within my own knowledge, where some disadvantage resulted by getting evidence of the witnesses beforehand for the purpose of calling others to contradict them on the trial. To return to the case of *Plummer v. May*, it is clear, that Lord *Hardwicke*, acting upon principle, has established the distinction, that it is not enough to say, in order to dismiss the bill, that a party may be a witness, provided it appears upon the face of the bill that he has some interest which upon his demurrer he admits: in that case a bill of discovery may be sustained against him.

There was a subsequent case cited at the bar, which is worthy the greatest attention; that of *Fenton v. Hughes*(a). A person of the name of *Hughes* had brought a *qui tam* action upon the statute of usury against *Fenton* to recover penalties, upon which *Fenton* files his bill of discovery

(a) 7 Ves. 287.

against *Hughes* and *Bate*; and he charges in the bill that the action was commenced by *Hughes* at the instance of *Bate*; and then he sets forth certain transactions respecting bills of exchange, and the discounting of bills of exchange and matters of that sort, in which *Bate* and another person had been concerned with him; but he does not set forth any species of interest which *Bate* had in the suit; excepting that it was commenced at his instance. To this bill, *Bate* demurred. Now let us consider for a moment what the result of this statement would be. The action on the statute of usury is brought for the benefit of the plaintiff who brings the action. The informer has nothing at all to do with it; he may be a witness for the plaintiff or for the defendant. He has no interest whatever in it, excepting by some contract he might make with the plaintiff to divide. If he did that, he would be liable to an objection as a witness upon the *voir dire*, if called by the plaintiff; because, if he admitted he was to receive the money sought for, or had authorized the attorney to bring the action at his cost, that interest would exclude his testimony for the plaintiff; but in no way could he have an interest to preclude his being a witness for the defendant. The case was argued before my Lord *Eldon*. It is very singular that this peremptory and inexorable rule, which has been so much relied upon in argument before me, was not suggested—that *Bate* was not a party to the record at law. Lord *Eldon* took time to consider of it, for I see by the mode in which it is reported that he gave his judgment on a subsequent day. His judgment is very elaborate. I think I may safely appeal to the gentlemen whom I now have the honour of addressing whether any judge ever sat in any Court, whose mind was more full of principles, however narrow the lines of his decisions might sometimes be, who yet took a more enlarged and discursive view of the whole of the case than my Lord *Eldon*. Lord *Eldon* was not a case lawyer only. He was deeply imbued with the prin-

1836.

GLYN

v.

SOARES.

1836.

GUTH

v.

SOMERSET.

principles both of common law and of equity ; and any judgment of his, whatever effect it might have as a precedent, perhaps somewhat narrowed by his great anxiety to individualise cases, yet is a very instructive judgment to those who wish to learn. I well remember when that noble and learned Lord first sat as a judge at common law, that the impression which he made upon my mind when he summed up a case to the jury was, that if in some cases he made distinctions too numerous and too refined, which might perhaps perplex a jury not accustomed to legal discrimination, he was a most admirable judge, in all cases, for illustrating every point and giving due effect to every argument suggested by the counsel or by the case before him, on the one side and on the other. I cannot doubt that if such a rule had existed, it would not have been overlooked by him; and he would not have resorted to any of the other arguments which he has adopted for the purpose of allowing that demurrer. What is his judgment? He says that he has looked with great anxiety into the bill, to see if he could discover any sort of interest that *Bate* had to make him any thing but a witness ; and he goes through the topics to shew that *Bate* was clearly a witness at law for the party who had filed that bill ; that if he could not be a witness on the other side, by reason of any interest yet undiscovered, that was for the advantage of the plaintiff in equity ; and he comes to the conclusion that there is not such a charge of interest in *Bate* as justified him in retaining the bill against him. Now, if the bill had stated that the plaintiff in the action and *Bate* had agreed to divide the profits, or if it had stated that *Bate* had some such interest in the suit as identified him in interest with the plaintiff in the action, though not himself a plaintiff on the record, I should have thought it probable, from Lord Eldon's judgment, that he would not have allowed the demurrer. But, on the grounds which I have already stated, he was of opinion that the bill could not be sustained.

Is not the distinction, therefore, clearly drawn, as Lord *Hardwicke* has drawn it in *Plummer v. May*, though the decision was the other way? In *Plummer v. May* the demurrer was overruled by Lord *Hardwicke*, because an interest was charged and admitted by the demurrer. In *Fenton v. Hughes*, the demurrer was allowed by Lord *Eldon*, and the bill dismissed, because no interest was charged, and the defendant appeared only as a witness. Lord *Eldon* alludes to the case of *Plummer v. May*, and states, that unless it appeared that the party had an interest, that judgment of Lord *Hardwicke* could not be supported.

Now, looking through the various cases down to a late period, I am still at a loss to see anything else than a laboured distinction in what is alleged to give a party an interest, or no interest, to sustain a bill of discovery. I see nothing whatever to warrant the maxim suggested as the foundation of this argument. There is a case, however, which appears to me to decide the very question: that is, the case of *The Bishop of London v. Fytche and Eyre* (a). In that case Mr. *Fytche*, who was the owner of the advowson of a living at *Woodham Walter*, in *Essex*, brought an action of *quare impedit* against the bishop, for not admitting his clerk, Mr. *Eyre*. The bishop filed a bill of discovery against both *Fytche* and *Eyre*, that is to say, against both the owner of the advowson and the clerk, suggesting, that a bond had been given to place *Eyre* under an obligation of resigning at the request of the patron; and he required a discovery of that fact. That bill was demurred to before Lord *Thurlow*; and the most eminent counsel of the Courts of equity of that time were engaged on both sides. Their arguments are given in the report, and it is very singular that none of them suggested that *Eyre* was not a party to the record, and that the learned Judge who decided the case never noticed that circumstance as an

1836.

GLYN
v.
SOARES.

(a) 1 Bro. C. C. 96.

1836.

GLYN
v.
SOARES.

objection. The question was—whether it was not a charge of simony? Lord *Kenyon* was then himself at the bar, and argued the case before the House of Lords afterwards on appeal. He was counsel for *Eyre*, and made two objections: *first*, that the discovery sought was immaterial; and, *secondly*, that if material, it must be because the contract was simoniacal, and that it was contrary to the rules of equity to compel a man by means of a bill of discovery to confess a crime. Lord *Thurlow* overruled both objections: he stated, as to the last, that he did not see the consequence so necessary. In point of fact, Lord *Thurlow* was right. If you come to look at the grounds in which a party can be charged penally with simony, he must have done something more than merely give a bond to resign. But however, whether he was right or wrong in that, it was the ground of his decision, that there was no necessary punishable criminality to be inferred from it. But, as to the other objection, he says—“it is the first time I ever heard want of materiality alleged as a ground of demurrer to a bill of discovery. The plaintiff is the best judge whether it is material or not; he pays the expenses of it, and if he thinks it is material, why should I decide against him? I must be satisfied that it is perfectly frivolous before I can dismiss his bill on that ground.” But an attempt is made to answer the case of *The Bishop of London v. Fytche*, by stating, that the clerk is necessarily a party interested, and that the complaint in the *quare impedit* is for not admitting that clerk, and therefore in some sort he is a party to the record. That is an attempt, ingeniously made in argument by Mr. *Cresswell*, which appears to me to have no just foundation. It was the patron who brought the *quare impedit* against the bishop for not admitting his clerk—that was, to try his right to the presentation. It does not follow when the patron's right is established, and judgment is given against the bishop, that the

patron must present the same clerk again : he may present another. Suppose the bishop's defence is (as in that case it was) that the clerk presented is an improper man—that he has been guilty of simony, and therefore ought not to be presented—the bishop has a right to judge of the character and fitness of the person whom the patron presents ; and if his judgment is a correct and proper judgment, though the right of the patron be not disputed, yet the particular case must be decided in favour of the bishop ; and if so, the patron may present somebody else. If it is decided in favour of the patron, he is not bound to present the same clerk ; and, therefore, that clerk is no more a party to the record, than any person whose name is introduced historically or incidentally upon the record. I am not sure, except for the certainty which the common law requires, that the very mention of the name of the clerk was necessary : for, if the patron had stated in general terms, that he had presented as clerk a fit and proper person, and that the bishop would not admit him, and that the bishop prevented him taking possession and enjoying the living, by refusing to induct him—I apprehend that would be sufficient ; it would certainly be sufficient after a verdict. From this it seems clear, that the clerk was no more a party to the record from his name being inserted in the declaration, than any individual is a party whose name is found in an allegation of special damages by reason of the loss of his custom and trade. Therefore, the case of *The Bishop of London v. Fytche* is a direct decision, that where a party is interested in the subject matter of the suit, a bill of discovery may be sustained against him, though not a party to the record at law, as well as against an individual who is a party on that record.

But now we come to the numerous class of admitted cases ; namely, of bills of discovery against the assured, where the agent brings the action upon a policy. It is ad-

1836.

GLYN
v.
SOARES.

1836.

GLYN

v.

SOARES.

mitted freely, that in those cases it has been the constant practice, both in this Court and the Court of *Chancery*, to allow bills of discovery to be filed, not only against the plaintiff in the action, but also against the assured, on whose behalf the action at law is brought in the name of the agent. That practice being admitted, it is endeavoured to withdraw it from the support of the bill in this case, by stating, that the party named upon the record at law as a party interested, is substantially the plaintiff on the record. That is to me a new proposition. There is not the least doubt that at common law the party assured, inasmuch as he is not the plaintiff on the record, may be called as a witness for the defendant, and cannot refuse to be examined: upon that there is no question. For the plaintiff he cannot be called; for if on the *voir dire* he admits he is a party interested in the suit, he must be rejected; but, if the defendant calls him, the defendant may waive his objection to his having an interest, and examin   him. Upon what ground is it then that he is made a party to a bill of discovery? On the ground of his being a party interested, and upon no other ground. He is a party interested for whose benefit the action is wholly or partly brought, and therefore a Court of equity exercises jurisdiction over him, and compels him to disclose the truth in order to aid the party against whom he seeks to recover a verdict. But it is not true that the case where the assured is named on the record is the only case in which a bill in equity has been entertained for discovery. The necessity of his being named on the record arises only from the stat. 19 *Geo. 2*, c. 37, which makes policies, interest or no interest, illegal; but that statute excepts all policies on foreign vessels (*a*); and, therefore, if the action is brought on a policy effected on a vessel not belonging to any of His Majesty's subjects, the allegation of interest not being necessary, because the policy may be interest or no interest,

(*a*) See sect. 3.

1836.

GLYN
v.
SOARES.

the declaration will be good without having any such party on the record as the party assured is alleged to be in ordinary cases. Well, what is the consequence? It does not follow that because the insurance is upon a foreign vessel, the underwriter has not open to him all or many at least of the ordinary objections. It is said by Lord *Mansfield*, that, on a policy interest or no interest, the loss of the vessel on the voyage was always contemplated—that is his dictum. But suppose a foreign vessel is insured, interest or no interest. One of the causes of loss against which the underwriter insures is barratry. Now, barratry cannot be committed, if the owner consents to, or is privy with, the captain or the crew, in committing that fraud, and therefore it is a defence to the underwriter where barratry is charged, to shew that the owner was concurring in the act. Suppose a policy on a foreign vessel, and that the defence of the underwriter is—that the owner of that vessel was privy to the intention of the captain to scuttle and to sink her; you need not allege his interest in the policy, you may simply say it was a foreign vessel; but if the underwriter discovers who was the owner, and has reason to think that he caused the loss, he has a clear right to set up that defence. It is not very long since we had a trial at *Guildhall* respecting an owner in *Portugal*, of a vessel that had been sacrificed, as it was thought, purposely to defraud the underwriters. I rather think there was a bill in equity in that case; but, at all events, I am sure that a bill might have been justly maintained for a discovery (a). Now, if in that case it had been said, that you could not file a bill in equity against the owners because they were not parties on the record, the consequence would have been a complete failure of justice. In that

(a) It was here observed at the bar that a bill in equity had been filed in that case. It was the case of the *Vianna*.

1836.

GLYN

v.

SOAKES.

very case some most important frauds were discovered, which not only made a defence to the action on the policy, but afterwards became the subject of a very serious prosecution and punishment of the parties to that fraud. It appears to me, therefore, that the ground insisted on—that the cases of policies are excepted cases—is a mistaken ground; that, on the contrary, they are not excepted cases, but fall within the general rule, that where a party interested is charged in a bill of discovery and called on to disclose, he is bound to do so; and that a Court of equity will compel him to do so, though he is not a party on the record.

There are a great variety of cases well known to common lawyers, in which an agent may maintain an action in his own name in respect of his being a party to the contract, or the principal may maintain an action in his own name in respect of his interest. Now, such is the case (of very ordinary occurrence) of actions on bills of lading for freight. The captain may maintain an action in his own name for the freight as being a party to the contract; the owner in respect of being the owner, and entitled to receive the money. Now, I will put this case:—Suppose the owner of a foreign ship, the captain of which has signed the bills of lading, being abroad, sells the cargo, (being the owner both of the cargo and the vessel); that the party has paid him for the freight, the contract being that the owner is to take the freight in the price of the goods, and not to charge freight; and that when the captain comes here, he nevertheless brings an action for the freight—why, if you file a bill of discovery against the captain, he can say nothing but that he has signed the bills of lading, that the defendant is the consignee, and that he has taken the goods on the implied undertaking that he would pay the freight: in what way then is the defendant to accomplish the justice of the case if he may not have a bill of discovery against the

owner and an injunction? He cannot subpoena him as a witness, because he is not amenable to a subpoena. It is said he may be examined by a commission, but no foreign Court of justice that I know of will compel one of its subjects to appear before a commission to examine witnesses issued from another country. Supposing he did not choose to appear and be examined; I think that counsel would be driven to say—then the Court has no remedy but to grant an injunction against the plaintiff at law until the witness does appear. Surely, if you could grant an injunction against proceeding in the suit, because the party who is the real plaintiff at law will not come in and be examined under a commission as a witness, on the same principle you may file a bill of discovery and grant an injunction till he makes answer to that bill.

The case of an action on a policy of insurance by the agent, and a bill of discovery against the principal, comes precisely within the range of cases to which I have adverted; but that is only one instance. There are various other cases, in which an agent may bring an action by reason of his being a party to the contract, and in which, I should conceive, on principle, that if it be admitted that he brings the action for his principal who is not a party on the record, a Court of equity will entertain jurisdiction by compelling a discovery against the plaintiff and that principal, who is the party interested. On these grounds, it appears to me, that the first objection fails. I wish, however, the grounds to be distinctly stated on which I sustain this bill of discovery against this objection: namely, that in all cases a plaintiff may file a bill of discovery in a Court of equity, not only against the plaintiff on the record at law, but against the principal on whose behalf that plaintiff sues, by reason of the interest which he has, and which makes him directly amenable for the purpose of making a discovery, and enables the defendant at law to read his answer in evidence. A plaintiff or defendant

1836.

GLYN
v.
SOARES.

1836.

CLYB.

P.

SO'1222.

may call a person interested to prove a case against himself undoubtedly; but it is very fit that he should know before-hand something of what that person may say. In the case before Lord *Kenyon*, his Lordship said, that he must know something of the case which he wanted to discover before he could frame his original writ. So I say, that a bill of discovery is, in nine cases out of ten, not so useful for the purpose of reading the answer in a Court of law, as for the purpose of informing the plaintiff in equity what the parties interested in the suit mean to deny or to admit, and in what manner they seek to put their case. In the present case, it is admitted by the demurrer that the action is brought on behalf of the Queen of *Portugal*, exclusively for the purpose of placing at her own disposal funds, which, upon the suggestion of the bill, I assume for the purpose of this argument, do not belong to her; funds, which in equity and good conscience she ought not to take; and that the plaintiff on the record is nothing more than her agent, having no *scintilla* of interest whatever, not even paying the costs of the suit he has brought, against which she indemnifies him. Under these circumstances, it appears to me, that unless that party living abroad, not amenable to the jurisdiction of this Court, and not liable by any process to be compelled to answer under a commission to examine witnesses, could be made, by the process of injunction and discovery known in Courts of equity, to make a disclosure of facts, of which Mr. *Soares* can know nothing and on his oath can say nothing of his own knowledge, it would be a failure of substantial justice. 'Now a Court of equity entertains that jurisdiction: which, whether it has existed from time immemorial or not, has at least been long sanctioned by time, of compelling a discovery and granting an injunction, undoubtedly exercising a most useful and beneficial process of compelling parties to do justice who seek justice. Upon these grounds I am of opinion, that, on principle and on law, there is no objec-

tion to this bill of discovery because one of the defendants is not a party to the record at law.

Now we come to the other ground,—that supposing all the facts admitted by the demurrer to be true, they furnish no defence at law; and I am pressed in argument that I must come to the definite conclusion, that the plaintiff cannot maintain the action at all, and that the case in the bill is a good defence at law, before I can allow this bill of discovery. It appears to me that there is a fallacy in that argument, and that I am not bound in the present discussion to ascertain the ultimate conclusion to which I should come on the merits. I just now stated Lord *Thurlow's* opinion in the case of *The Bishop of London v. Fytche*. He says, he never heard that want of materiality was an objection to a bill of discovery; that the plaintiff is the best judge what use he can make of it, and that it is sufficient if it does not appear to be absolutely frivolous. I, therefore, must say that the proposition as stated is not true, but that the true proposition is this,—that provided I can be satisfied definitively that the defence suggested to be made at law is perfectly frivolous, and is set up merely to gain time, and that, all the facts being admitted, I must of necessity conclude, without argument, that upon the very surface they amount to no defence—that in that case I ought not to allow the bill of discovery: but, on the other hand, that it is sufficient to render the bill sustainable if the parties make out a case that is triable—a case that will bear argument. I will not, therefore, upon the facts alleged in this bill of discovery, decide definitively whether they amount to a good defence at law or not. If I see a case of reasonable doubt, I am bound to permit the discovery to go on. Now what is this case? It is alleged that as the bankers received consideration for accepting the bills, they can make no defence. Let us illustrate that shortly. Supposing a man places 100 sovereigns in the Bank of *England*, and receives for it a 100*l.* bank

1836.

GLYN
v.
SOARES.

1836.

GLYN
&
SOAKES.

note. That bank note is a promise to pay on demand to the bearer, which is the same thing as accepting a bill of exchange payable to bearer. If the person making that deposit is robbed of it on the highway, and the robber or his agent brings an action against the Bank of *England*, may not the Bank of *England* make a defence? Why, the famous case of *Miller v. Race* (a), established the distinction which has been adopted in the law since, and which has perhaps been pushed to a further extent than the law warrants. It was an action of trover against the Bank of *England* for impounding a bank note, and the evidence was, that a gentleman sent this bank note by the general post, under cover, directed to a person at *Chipping Norton, Oxfordshire*; that on the same night the mail was robbed, and the bank note in question taken and carried away by the robber; and that the plaintiff in the cause, who was a publican, in the usual course of business, had given change for it on the following day, not being at all acquainted with the robbery. An attempt was made to defend the Bank of *England*, on the ground that the original loss of the note by felony tainted the progress of it through all other hands. The case was much discussed at *Nisi Prius*; it was argued afterwards in the *King's Bench*; and it has been a leading case on the subject since. Lord *Manfield* determined that it was essential for the purpose of securing the circulation of bank notes or promissory notes of that nature, payable to order or bearer, that a plaintiff, who had given a valuable consideration for them without fraud, should be allowed to maintain an action for them, whatever fraud might have been committed with respect to them by others. He admitted that the robber himself could not maintain an action, nor his agent; but he said that *Miller* might maintain an action: and accordingly the action was successfully maintained

(a) 1 Burr. 452

against the Bank of *England*. I should think that the principle is as familiar as any thing that can be stated, that the acceptor of a bill of exchange has a right to put the party who brings the action to the proof that he is the legal owner of the bill. The moment that is done, his defence is undoubtedly at an end. The modern cases have gone very far in this respect. Lord *Tenterden*, in two or three cases, went the length of deciding that the acceptor of a bill of exchange might even make a defence against the party who had given consideration, provided it was proved that he gave that consideration under circumstances of such suspicion and of so doubtful a character, as to make it prejudicial to the public interest that a man should so deal. In one of the cases (a), where a bill of exchange was stolen from a letter in the post-office, and within an hour or two, at an early hour in the morning, was carried to a discounter of bills of exchange in *Lombard Street*, whose clerk discounted it, and made no inquiry at all, did not ask the address of the holder, or of a single name upon it, Lord *Tenterden* left it to the jury whether or not the habit of discounting bills in that way at an unusual hour, without inquiry, was not very much like that of receiving stolen goods; and the jury found that the want of caution by the party who so took the bills, deprived him of the right of maintaining an action. Subsequent cases (b) have thrown some doubt upon the length to which that learned Judge went; but the principle is not disputed, that if the party can in any way be suspected of being privy to the fraud by which the bill was obtained, the giving a consideration for it in order to enable the party to bring the action is not enough for that purpose; and therefore the acceptor has a right to defend

1836.

GLYN
v.
SOARES.

(a) *Gill v. Cubitt*, 3 B. & C. 466; 5 D. & R. 324. See *Down v. Halling*, 4 B. & C. 330; 6 D. & R. 455.

(b) *Crook v. Jadis*, 5 B. & Ad. 909; 3 N. & M. 257; *Backhouse v. Harrison*, 3 B. & Ad. 1098; 3 N. & M. 188. .



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ceeded against him, in turning him out of possession, says—"I do not want the money, and I will not grant the mortgage;" and, suppose those bills of exchange to be in the hands of an agent of the original proposed mortgagor, for the purpose of being received when due; and, suppose the agent (to make the case more analogous) to be also appointed under the new owner, who finds these bills in his possession, and says—"Now, indorse these bills to my bankers in *London*, to be received on my account:" can the acceptor of the bills make a defence? The consideration for the bills is gone, because the mortgage cannot be granted on the faith of which the bills were given. It is clear, as between the original parties to the contract, the consideration is gone; therefore the acceptor might make a good defence against them. Shall it, then, be said, that he cannot make a good defence against another person, who has got them by fraud? Besides, it is by no means clear to me in this case, that, if the agents of *Don Miguel* brought an action, they could recover. It is said here, that it is on their interest that the action is defended; be it so: I must look to see the legal result. I can easily conceive a case, where neither they nor the other party could maintain an action; where, the original consideration being gone by matter *ex post facto* would amount to a defence against these parties, and where the other party could not maintain an action because he paid no consideration, but obtained the bills by fraud. In that case, the banker might make a defence on behalf of the true owner against either party so bringing the action. Now, does it make any difference that the parties in this case happen both of them to be Sovereign Princes, the one *de facto* for a time, the other then *de jure*, but now *de facto*? It appears to me to make no real difference. I therefore think, that the bankers ought to be at liberty to make the defence in question in this case, if they can sustain it at law—either on the

1836.

GLYN
v.
SOARES,

1836.

GLYN

v.

SOARES.

ground that the parties who now hold the bills obtained them by fraud, or that the party in whom the bills were originally vested could not now maintain the action, the consideration being gone, and that, therefore, the money must be kept till some better owner is found. Why, the true owners ought to be the poor persons who were deluded in taking these bonds; and if they could be brought before a Court of equity, and made parties, it could not be doubted that, the consideration being refused, the Court would not allow anybody but them to get possession of the money, which was really and substantially advanced on the faith of that bargain.

There remains one question behind, which was not mooted at the bar, which, I have thought, required some consideration; and that is, whether a Sovereign Prince can be made amenable to any Court of judicature in this country. As a general proposition, he certainly cannot. We have no process to reach him, neither have we any jurisdiction over him directly. *Hullett v. The King of Spain* (a) was a case in which *Ferdinand*, the late King of *Spain*, filed a bill in equity. Now, where a sovereign prince himself files a bill in a Court of equity, he becomes immediately amenable to all the processes of equity, and the defendant in that suit has clearly a right to call on him to answer a bill of discovery. That was done in that case. Some question was made about it, because the gentleman who had filed the bill on behalf of the King of *Spain*, and in his name, had made an application to the Court to be allowed to put in an answer to the bill of discovery filed against the King of *Spain*, pledging himself to answer fully and truly all the facts required by the bill, and stating that the King of *Spain* could not be compelled to make an answer; that it would be against his high dignity, and that nobody would dare to propose it to

(a) 1 Dow & Clarke, 169; and 1 Clark & Fin. 333; 7 Bligh, N. R. 359.

him in his own country, with various other plausible reasons ; but he offered, by his deputy, to give a full and sufficient answer. My Lord Chancellor *Lyndhurst* refused the application. There was an appeal to the House of Lords, and that House confirmed his decision ; and it was there stated, that where a Sovereign Prince becomes a party in a Court of justice by becoming a plaintiff, he must submit to all the processes that the practice of the Court authorizes, as he had sought the benefit of that jurisdiction ; and however inconvenient it might be to His Majesty, or contrary to the rules which prevailed in his own country, yet, being a plaintiff in a Court of equity here, if an answer from him became necessary, that answer he must give according to the rules of the Court ; and they would not allow him the privilege which a peer exercises, of putting in the answer upon honour, but required it to be done upon his oath. It may be said that that case does not go the full length of this, because the Queen of *Portugal* is not a voluntary party to any proceeding in equity ; but it appears to me, on consideration, that the principle is the same in both cases. Here a foreign Princess is admitted by her agent to be a plaintiff in the name of that agent in a Court of justice in this country. If then the ends of justice require that that Princess, as a principal in the cause, should make a disclosure of certain facts, it appears to me that this Court, though it cannot entertain any jurisdiction to compel her to put in an answer, will nevertheless, as she has now become a party before the Court by her appearance, restrain her by injunction from proceeding in the action, until her answer is put in. Upon the authority, therefore, of that case, and the principle which that case establishes, and which I conceive to be just—namely, that where a sovereign Prince seeks a remedy in a Court of justice in *England*, that Prince must in some manner be compellable to do justice ; and also upon the several other

1836.

GLYN
v.
SOARES.

1836.

GLYNE
v.
SCARLE

grounds which I have stated, my opinion is that the demurrer in this case must be overruled.

I forgot to mention one case, which I ought to have adverted to in the first division of this question, namely, that of *Guppy v. Few*. It is mentioned by Mr. *Hare*, in his book on Discovery (a). I mention it in justice to my Lord *Lyndhurst*. A bill had been filed respecting the infringement of a patent in the Court of *Chancery*. The Lord Chancellor had directed that an action should be brought to try the validity of the patent. The patent appeared to be vested in a trustee for the benefit of certain persons; the action was, therefore, directed to be brought in the name of that trustee. A bill was filed by the defendant in the action against that trustee, for a discovery of certain documents and papers, which he alleged would amount to a defence. The trustee in his answer put these documents into the schedule, and referred to them in his answer. An application was made to the Vice-Chancellor on the ordinary motion that he should produce those documents to the clerk in Court, for the purpose of their being examined, and to have copies taken. That motion was resisted on this ground—that he was a trustee only, and held these documents as trustee for the benefit of the *cestui que trusts*, and that unless they were parties to the suit, a trustee could not produce these documents. The Vice-Chancellor adopted that argument. An appeal was made to the Lord Chancellor, and he overruled it on the clearest ground, because the trustee was a person directed to bring the action for their benefit, whom, he said, was in that case to be considered the equitable, as well as the legal representative of the party, and as much bound to produce the documents which he had mentioned in that schedule as the *cestui que trusts* were bound to produce them; and I think, on con-

(a) P. 124.

sideration, that nobody can doubt the propriety of that decision. But he is said to have gone further, and to have stated in his judgment that the *cestui que trusts* could not be made parties to a bill of discovery, because they were not parties at law. That very likely was said in argument before the Lord Chancellor, and he might have adopted that expression, but it was not the ground of the decision, and being the only expression of the sort to be found on the subject, I must suppose it was used inadvertently. I cannot agree with the proposition. Supposing the trustee had not the documents, but that the *cestui que trusts* had the possession of them, I cannot doubt that the defendant at law might have filed a bill against them and the trustee, to produce the documents. The action was brought by their agent, for their benefit, and at their own instigation; then could it be said that they were not to make a discovery of those documents in a Court of equity, for the purpose of evidence in the action at law? I think the expression must have been misunderstood, or made hastily, without adverting to the circumstances. It was not necessary, however, to determine the point; and it may be remarked, that the ground of the Vice-Chancellor's decision was, that the *cestui que trusts* were not made parties to the bill; if they had been parties, it seems to me that he would have acceded to the motion.

1836.

GLYN
v.
SOARES.

Demurrer overruled.



INDEX

TO THE

PRINCIPAL MATTERS.

ABATEMENT.

See PRACTICE.

ABATEMENT OF LEGACY.

See LEGACY AND LEGATEE.

ACCOUNT.

See PLEA AND PLEADING.

ACCOUNTANT.

See COSTS, 5.

ADVOWSON.

See AGREEMENT, 5, 6.

AFFIDAVIT.

See COSTS, 2.

PRACTICE.

AGISTMENT.

See TITHES.

AGREEMENT.

See LESSOR AND LESSEE, 1, 2, 3.

1. Time will, in equity, be deemed of the essence of the contract, in all cases where it can be collected from the terms of the contract, that the parties intended that the time for its completion should be strictly adhered to. But, where, upon an agreement for the purchase of an estate, the parties entered into a stipulation that an abstract of title should be delivered immediate-

AGREEMENT.

ly, and that, in case the contract was not completed by a given day, the purchaser should be released from his contract, and the abstract was not immediately delivered, but communications on the subject of the title were continued between the parties until the time limited by the contract had expired:—*Held*, that, under these circumstances, the benefit of the stipulation as to time was waived by the purchaser. *Hipwell v. Knight*, 401

2. Where a person had contracted for the purchase of an estate from trustees under a deed of release and assignment for the benefit of the creditors of a trader, upon a stipulation that a good title should be made by a given day, and that day fell within the period during which a fiat in bankruptcy might have issued against the trader:—*Held*, that he was in the situation of a purchaser who had waived a stipulation that time should be of the essence of the contract. *Ibid.*

3. Where parties contract that the purchase of lands shall be completed within so many months, *calendar* and not *lunar* months are intended. *Ibid.*

4. Courts of equity will give no encouragement to contracts which savour of maintenance or champerty, though such contracts may not be within the

700

1836.



GLYN

v.

SOARES.

1836.

1836.

1836.

1836.

BANKRUPT:

BANKRUPT.

See ELECTION.

MARRIAGE SETTLEMENT.

PLEADING, 3, 8.

WITNESS, 1.

BARON AND FEME.

See HUSBAND AND WIFE.

BILL.

See PRACTICE.

BILL OF EXCHANGE.

1. Where a bill of exchange has been negotiated by means of a forgery of the name of the payee as indorser, a Court of equity will restrain even a *bona fide* holder of the bill from suing the acceptor, and will direct the forged instrument to be delivered up to be cancelled. *Esdaile v. La Nauze*, 894

2. Where the original indorsement of the payee's name on a bill of exchange is a forgery, a real indorsement by the payee, after the bill has arrived at maturity, will not give the holder any title. *Ibid.*

CHAMPERTY.

See AGREEMENT, 4.

CHAPEL.

See TITHES.

1. There is nothing illegal in the supposition, that, in ancient times, a chapel and chapelry existed, to the curate or chaplain of which the rector of the parish, with the consent of all proper parties, may have assigned a portion of the tithes by way of endowment, reserving to the rector the right of patronage of the curacy; and therefore, where it appeared from ancient documents that a chapel had immemorially existed as a parochial chapel, with rites of baptism, marriage, and sepulture; and that, in early times, there were chaplains having an assignment of the tithes, as of old time, and

CHOSE IN ACTION. 705

there were appointments to the curacy from a very early period; and there was evidence of usage, on the part of the curate, to receive all small tithes of modern introduction:—*Held*, that the curate was entitled to all small tithes, except wool and lamb, which appeared from the documents to be clearly payable to the rector. *Dent v. Rob*, 1

2. Where parishioners, dwelling within a chapelry, contribute to the repairs of the parish church, it is strong, but not conclusive, evidence that the chapel is a chapel of ease to the inhabitants of the parish, and not a separate and distinct chapelry. *Ibid.*

3. It does not of necessity follow that there cannot be a parochial chapel because there has not been a union of parishes in ancient times, nor any vicarage or mother church with which the chapel can be supposed to have been anciently united. And the circumstance that there is no vicarage, may be accounted for by the fact of the rectory having been conveyed to a monastery prior to the statutes 15 *Rich.* 2, and 4 *Hen.* 4. *Ibid.*

CHOSE IN ACTION.

See HUSBAND AND WIFE.

1. An assignment of a bare right to file a bill in equity for a fraud committed on the assignor, is contrary to sound policy, and void: therefore, where *A.*, who was entitled to certain property under his father's will, for a valuable consideration, assigned the whole of that property (except a reversionary interest in the funds) to *B.*, his father's executor, and afterwards assigned the whole of his interest under his father's will (including, therefore, the reversionary interest) to *C.*:—*Held*, that *C.* could not maintain a bill to set aside the first assignment, on the ground of fraud committed by *B.* against *A.*, the latter refusing to join as plaintiff in the suit. *Prosser v. Edmonds*,

2. A chose in action, not coupled with any partial interest in possession, and which cannot be reduced into possession without a suit, is not assignable in equity. *Prosser v. Edmonds*, 481

CLERK IN COURT.

1. The office of sworn clerk of the Court of *Exchequer* is not abolished by any of the several statutes of 11 *Geo.* 4 & 1 *Will.* 4, c. 58; 11 *Geo.* 4 & 1 *Will.* 4, c. 70; and 2 & 3 *Will.* 4, c. 110. The object of the first-mentioned statute is to provide the means of paying the officers of the various Courts of justice by salaries instead of fees; that of the second, to abolish the monopoly of attornies' business which existed on the plea side of the Court of *Exchequer*; and that of the third, to distribute the duties of the officers of that Court, and to give to them appropriate names. *Clarke v. Richards*,

351

2. The remuneration awarded to a sworn clerk of the Court of *Exchequer* under the provisions of the 11 *Geo.* 4 & 1 *Will.* 4, c. 58, is not given as compensation for the loss of his monopoly of business as an attorney practising in that Court, nor even for the loss of his office of sworn clerk, that office not in fact being abolished; but it is given to him as a fixed salary for an office which he continues to hold, instead of a variable return of profits depending on casual fees. *Ibid.*

3. *Quære*, whether a legal partnership could exist in the profits of the offices of sworn clerk or side clerk of the Court of *Exchequer*, as those offices were formerly constituted? or, whether such a partnership can at present exist in the profits of the office of clerk of the rules of that Court. *Ibid.*

4. Where a personal office or employment is purchased with the partnership funds for the benefit of the partnership, the partner in whose name it is purchased is not necessarily a trustee of the profits of the office for

CONSTRUCTION OF DEED.

the other partners, after the term of the partnership has expired. *Ibid.*

COMMISSION TO EXAMINE WITNESSES.

See PRACTICE.
WITNESS.

COMMISSION OF PARTITION.

See PARTITION.

COMMISSIONERS OF WOODS AND FORESTS.

See AGREEMENT.

COMPOSITION.

See TITHES.

COMPOSITION REAL.

See TITHES.

1. Though it is not necessary to produce the actual deed creating a composition real, still reasonable evidence must be given to make it probable that such a deed once existed; and the mere circumstance of the possession of a piece of land mentioned in various ancient documents as having been assigned to the curate, is not a sufficient ground for any such presumption. *Dent v. Rob*,

1

CONSIGNMENT.

See PRINCIPAL AND AGENT, 1.

CONSTRUCTION OF DEED.

1. *Semble*, that a limitation in a settlement "to the executors and administrators of A., for their own use and benefit," unconnected with any other limitation shewing more specifically who are to take, is void for uncertainty. *Marshall v. Collett*,

232

2. Husband and wife having agreed to live apart from each other, a sum of stock was invested in the name of trustees, and, by a separation deed, containing the usual provisions, the husband agreed to pay to his wife, for her maintenance, an annuity of 180*l.*

a-year, and it was declared that the stock was intended as a security for the payment of that annuity. The deed contained a proviso that the husband should be indemnified out of the annuity against the debts and contracts of his wife, and all dower and thirds at common law or by custom, which she, at any time thereafter, might claim, challenge, or demand from, out of, or against her husband, or his present or future estate, real or personal; and an agreement that the wife should make and execute all such acts, deeds, and matters as should be requisite for the purpose of releasing, barring, or extinguishing all dower or thirds at the common law, or by custom, which she could or might claim or demand in, to, or out of any real or personal estate of her husband. The husband afterwards dying intestate, it was *held*, that the deed did not deprive the wife of her share of her husband's personal estate under the Statute of Distributions. *Slatter v. Slatter*, 28

CONSTRUCTION OF STATUTE.

See AGREEMENT, 5, 7. 8.

COSTS, 6, 7.

INFANT HEIR.

WEST INDIES, 1, 2, 3.

1. Where an act of Parliament establishing a railway company, authorized the company to purchase lands of corporations, tenants for life, &c., and directed that the purchase-money should be applied in the redemption of the land-tax upon other parts of the property unsold:—*Held*, that a tenant for life, who had redeemed the land-tax before the passing of the act, might reimburse himself out of the proceeds of the lands purchased of him by the company. The costs of an application to the Court under such an act of Parliament, to have the purchase-money applied in the *redemption of the land-tax*, will be allowed, although the act only makes an express provision for

such costs in cases where the money is to be laid out in the purchase of lands to be settled *to the like uses*. *Ex parte Northwick*, 166

2. Where an act of Parliament, establishing a railway company, directs that the money to be paid for lands to be purchased by the company shall be paid into the Bank, until the same shall, upon petition, be applied in the purchase of other lands; and, in the meantime, until such purchase can be made, shall, upon application to the Court, be invested in the funds; and that the expenses and costs attending such purchase shall be paid by the company:—*Held*, that, under the latter clause, a party applying to have the money invested in the funds is not entitled to the costs of the application. *Ex parte Taylor*, 229

3. To obtain a re-transfer of stock under the provisions of the 56 Geo. 3, c. 60, it is not necessary for the petitioners to shew that they are beneficially entitled to it; it is sufficient if they prove their legal claim. *In re Bigg*, 245

4. Where, by a railway act, it was enacted that the monies paid into Court by the company for lands purchased by them should, by order made upon the petition of the party interested, be invested in the purchase of other lands, to be settled to the like uses, and, in the meantime, should, by an order similarly obtained, be invested in the funds; and it was further enacted; that the Court might order the expenses of such purchases, and of the investment of the purchase-money in land "or other disposition of the same," to be paid by the company:—*Held*, that the company were liable to pay the expenses of the interim investment of the money in the funds. *Ex parte Onslow*, 553

5. Devisees of lands in trust for charitable purposes, having sold part of those lands under the provisions of the *London Bridge Acts*, were held not

entitled to their costs out of the fund arising from the sale; although the will creating the trust directed that the estate should defray the expenses of defending the trust property. *Ex parte Towgood*, 588

CONTEMPT.

See PRACTICE, 3.

CONTRACT.

See AGREEMENT.

COPIES OF DOCUMENTS.

See COSTS, 2.
PRACTICE.

COPYHOLDS.

See MORTGAGOR AND MORTGAGEE.

COPYRIGHT.

1. To publish, in the form of quadrilles and waltzes, the airs of an opera of which there exists an exclusive copyright, is an act of piracy. *D'Almaine v. Boosey*, 288

2. The *English* assignee of the copyright of a foreign musical composer is within the protection of the statutes relating to copyright. *Semble*, that a foreigner who resides and publishes in *England*, is within the like protection. *Ibid*,

CORPORATION.

1. A Court of equity will not compel a corporation to execute a legal assurance of corporate property in pursuance of a contract not under seal, unless valuable consideration for the contract be expressly proved, or evidence be given of acts done or omitted by the contracting party, on the faith of the expressed legal assurance. *Wilmot v. The Corporation of Coventry*, 518

2. *Quære*, whether a corporation can borrow money except under seal? *Ibid*.

COSTS.

See CONSTRUCTION OF STATUTE, 2.
DEMURBER.
PRACTICE, 3.
TITHES, 11.

1. Where any of the plaintiffs in a suit live in the country, close copies of the answer will be allowed, and the costs of them will be costs in the cause. *Small v. Attwood*, 53

2. Costs may be allowed for affidavits used in reference to the common injunction. *Ibid*.

3. Commissioners for the examination of witnesses ought not to be paid according to the number of office folios of the depositions, but according to the number of days on which they actually sit. *Ibid*.

4. The costs of all copies of documents, which are required by the Judge for his assistance in hearing the cause, are costs in the cause. *Ibid*.

5. The expense of an accountant, employed with reference to and pending the suit, does not come under the general denomination of costs, and will not be allowed on taxation. *Ibid*.

6. Tenant for life of land sold under the provisions of the *London Bridge Act* (10 Geo. 4, c. cxxxvi.) is not entitled to his costs out of the fund arising from the sale. *Ex parte Pasmore*, 75

7. Trustees for sale of lands in settlement, which lands are afterwards sold under the provisions of the *London Bridge Act* (10 Geo. 4, c. cxxxvi.), are entitled to their costs out of the corpus of the fund arising from the sale. *Ex parte Layfield*, 79

8. An executor or trustee, who retains a balance in his hands, and against whom a suit is instituted, will not be charged with the costs of the suit, except under circumstances of considerable misconduct. *Bennett v. Atkins*, 247

9. Where a suit is instituted with unnecessary haste against an executor or trustee who has not grossly miscon

ducted himself, he will be allowed his costs. *Ibid.*

10. A trustee who has purchased the trust property and sold it at a profit, and who has been compelled by a suit in equity to refund that profit, will not, except under circumstances affecting him with moral fraud, be charged with the costs of the suit. *Baker v. Carter*, 250

11. A suit instituted for the purpose of regulating and apportioning a rate levied on the inhabitants of a parish under an act of Parliament, ought to be by information and bill, and not by bill only; therefore, a person who had filed a bill for this purpose on behalf of himself and all other the rated inhabitants of the parish, upon affidavits being made of his insolvency, was ordered to give security for costs. *Tredwell v. Byrch*, 476

12. Plaintiff, who, under circumstances, had been ordered to give security for costs by reason of his insolvency, but who had not complied with the order, was ordered to give that security within ten days, or his bill to be dismissed. *Id.* 480

13. Where husband and wife, who were living apart, had put in separate answers and appeared by different solicitors, separate costs were allowed, there being no evidence in the cause of the grounds of their separation. *Barry v. Woodham*, 538

CREDITOR'S DEED.

See PLEA AND PLEADING, 15.

CROSS BILL.

See PLEA AND PLEADING, 6.

CURATE.

See CHAPEL, 1.

CUSTOM.

See TITHES.

CUSTOMARY PAYMENT.

See MODUS.

TITHES.

DEBTOR AND CREDITOR.

1. Where a judgment creditor had allowed 20 years to elapse without taking steps to recover his debt, and then ascertained that during the 20 years a suit had been instituted for the benefit of the specialty creditors of his debtor, and that under a decree in the suit they had received part payment of their debts, and that there was money in Court available for the payment of the remainder:—*Held*, that he was barred by the Statute of Limitations from proving his debt before the Master, and receiving payment rateably with the other creditors. *Berrington v. Evans*, 434

DEED.

See CONSTRUCTION OF DEED.

DEEDS AND PAPERS.

See PLEA AND PLEADING, 6, 10.

PRACTICE, 1, 6, 7, 8, 13, 14, 21.

DEMURRER.

See PLEA AND PLEADING, 16.

PRACTICE, 2.

1. A demurrer to the relief will not extend to the discovery sought by the bill, although the specific relief prayed may be improper, if the bill states a clear case for equitable relief to which the discovery sought may be ancillary, and likewise concludes with a prayer for general relief. *Deare v. The Attorney-General*, 197

2. Demurrer under circumstances, overruled with full costs. *Best v. Gompertz*, 620

DEPOSITION.

See PRACTICE, 11.

WITNESS.

DEVISE.

See WILL.

DISCOVERY.

See DEMURRER, 1.

PLEA AND PLEADING, 18, 19.
PRACTICE.

DISTRINGAS.

1. A party, who had purchased a reversionary share in certain stock, caused a *distringas* to be laid upon it, and afterwards filed a bill in *Chancery* to have his interest in the stock ascertained, alleging conflicting claims; the *distringas*, not having been followed by any suit in this Court, was discharged with costs. *Argent v. The Bank of England*, 557

DOWER.

See CONSTRUCTION OF DEED, 2.

ECCLESIASTICAL SURVEY.

See TITHES.

ELECTION.

See WILL, 1.

The creditors of *A.* having issued a fiat in bankruptcy against him, and having at the close of the proceedings under the fiat received notice, by means of the examination of the bankrupt and others, that *A.* was only the agent of *B. & Co.* proceeded nevertheless to sign *A.*'s certificate:—*Held*, that this was not an election by the creditors to treat *A.* as their sole debtor. *Taylor v. Sheppard*, 271

ENDOWMENT.

See CHAPEL, 1, 2, 3.
TITHES.

EVIDENCE.

See CHAPEL, 1, 2, 3.

PLEA AND PLEADING, 17.
TITHES, 3, 4, 7.
WITNESS.

HUSBAND AND WIFE.

1. The mere refusal of a witness to produce a document, where he is not justified in withholding it, is not a ground for going into secondary evidence of that document. *Jesus College v. Gibbs*, 145

2. Certified copies of the schedule, &c., may be given in evidence under the Insolvent Act, by parties other than the insolvent or his creditors. *Price v. Assheton*, 441

EXAMINATION OF WITNESSES.

See COSTS, 3.

EXCEPTIONS.

See PRACTICE, 4, 10.

EXECUTOR.

See COSTS, 8.
WILL.

FOREIGN JUDGMENT.

See PLEA AND PLEADING, 12.

FORGERY.

See BILL OF EXCHANGE.

FRAUDS.

See STATUTE OF FRAUDS.

FRAUDULENT CONVEYANCE.

See VOLUNTARY CONVEYANCE.

GUARDIAN AND WARD.

Where a person is appointed guardian, under a will though not duly executed for that purpose, the Court will appoint him without a reference. *Hall v. Storer*, 556

HUSBAND AND WIFE.

See CONSTRUCTION OF DEED.
COSTS, 13.
WILL, 1.

1. Where the first husband of a woman entitled to a legacy of 600*l.*,

chargeable, in default of personalty, on the testator's real estate, verbally agreed with the three devisees of the real estate to sell the legacy to them for 200*l.* a piece, but received the consideration from one only of the devisees, taking interest on the 400*l.* due from the two others:—*Held*, that to the extent of 400*l.* this was not a reduction of the legacy into possession; and that to a suit instituted by the woman and her second husband to recover what was due on the legacy, the representatives of the first husband were not necessary parties. *Harwood v. Fisher*, 110

2. By a marriage settlement, stock was assigned to trustees, upon trust to pay the interest and dividends to the husband for life, and in case he should survive the wife, upon trust to transfer the said stock to the husband, "his executors, administrators, or assigns, to and for his or their own use and benefit;" but in case the wife should survive the husband, upon trust during her life to pay the interest and dividends as she should appoint, and, after her decease, upon trust to transfer the stock "unto the executors or administrators of the said *G. M.* (the husband) to and for their own use and benefit." The wife survived the husband, and took out administration of his effects, and claimed an absolute interest in the whole *corpus* of the stock:—*Held*, that she was not entitled. *Marshall v. Collett*, 232

ILLITERATE PERSONS.

See PRACTICE, 19.

IMPERTINENCE.

Prolixity in an answer is impertinence; but it is a question of degree. Therefore, in a bill for an account of money transactions between the plaintiff and the defendant, it having been required that the defendant should set forth in a schedule a variety of minute particulars concern-

ing certain securities which were alleged to have been deposited with him:—*Held*, that it was not an act of impertinence to annex to the answer a schedule with *columns*. *Gompertz v. Best*, 114

IMPROPRIATOR.

See TITHES.

INFANT HEIR.

An application under the 1 *Will.* 4, c. 47, s. 11, for an infant heir or devisee to convey, must be made by petition, and not by motion. *Anon.* 75

INFORMATION.

See PLEA AND PLEADING, 3.

INJUNCTION.

See LESSOR AND LESSEE.

PLEA AND PLEADING, 5.

PRACTICE, 14, 15, 16, 17.

INSOLVENT.

See COSTS, 12.

LESSOR AND LESSEE, 5.

VOLUNTARY CONVEYANCE.

INSURANCE.

An insurance was effected on goods on board a ship consigned to *Buenos Ayres*. The ship, with the cargo, was captured by the *Brazilian* government, and condemned for an attempted breach of blockade. Notice of the capture was given by the insured to the underwriters, and an offer was made by the insured to abandon. The underwriters declined the offer of abandonment; and, after some negotiation, it was arranged, that on payment by the underwriters of 35*l.* *per cent.* on the sum insured, the policy should be delivered up to be cancelled. This *per-centage* was accordingly paid, and the policy cancelled. Some years afterwards, in pursuance of a convention between *Great Britain* and the *Brazilian* government, the goods were ordered by the latter government to be restored to the owners,

and compensation made. A claim was made by the underwriters to the whole or a part of the sum awarded for compensation; but *held*, that the underwriters having declined the offer of abandonment, the payment of the 35% per cent. was a compromise of their liability under the policy, and that they were not entitled to any portion of the sum awarded for compensation. *Brooks v. MacDonnell*, 500

INTERROGATORIES.

See PRACTICE, 11.

JOINT STOCK COMPANIES.

See PLEA AND PLEADING, 1.

LANDLORD AND TENANT.

See LESSOR AND LESSEE.

LEGACY AND LEGATEE.

See WILL, 1.

LENGTH OF TIME.

See DEBTOR AND CREDITOR.

PLEA AND PLEADING, 9, 11.

PRACTICE, 17.

LESSOR AND LESSEE.

1. In a correspondence between lessor and lessee respecting the granting of a new lease to the lessee, the latter having spoken of the *renewal* of the old lease, the lessor did not object to this expression, but adverted to other topics connected with the subject. On a bill filed for the specific performance of the agreement for renewal alleged to be contained in these letters:—*Held*, that they were so far evidence of such agreement, as to warrant the continuance of an injunction against an action of ejectment brought by the lessor against the lessee. *Price v. Assheton*, 82

2. Where an agreement to renew a lease contains no stipulation as to the term of its duration, it is implied that

MARRIAGE SETTLEMENT.

the new lease shall be of the same duration as the old. *Ibid.*

3. One having a power to lease at the most improved rent agrees to grant a lease at a rent to be estimated at a fair valuation, without reference to improvements made by the lessee, but these improvements are deemed part of the consideration for the lease. *Quære*, whether such a lease is consistent with the terms of the power? *Ibid.*

4. Bill for specific performance of an agreement to renew a lease, dismissed; the agreement being too vague and uncertain to be executed by the Court. 441

5. The insolvency of the intended lessee is a good ground of objection to a bill brought by him for the specific performance of a contract to renew a lease. *Ibid.*

LIEN.

See PLEA AND PLEADING, 1.

LONDON BRIDGE ACTS.

See CONSTRUCTION OF STATUTE, 5.
Costs, 67.

MAINTENANCE.

See AGREEMENT, 4.

TITHES.

MARRIAGE SETTLEMENT.

A., upon his marriage, executed to the trustees of his marriage settlement a bond, and also a mortgage of his estates at *S.*, for securing to them a sum of 15,000*l.*, the trusts of which were declared to be for *A.* for life, and afterwards for the benefit of his wife and children. *A.* not having paid this sum at the time specified in the bond, without notice to the trustees, assigned his life interest therein to *B.*, as a security for the repayment of a debt due from *A.* to *B.* *A.* having afterwards become bankrupt, *B.* filed his bill against the trustees and the assignees under the bankruptcy, to obtain the benefit of his security; and a decree was made

MARRIAGE SETTLEMENT.

in that suit, directing the life interest of *A.* in the 15,000*l.* to be sold, and the produce to be paid to *B.* In the course of the proceedings in the bankruptcy, the assignees sold the *S.* estates, but the proceeds of the sale did not amount to 15,000*l.*:—*Held*, that the trustees were entitled, as against *B.*, to retain the annual produce of the sum for which the *S.* estates were actually sold, until the whole of the 15,000*l.* should be reinstated. *Smith v. Smith*, 338

MEMORANDA, 168.

MESNE PROFITS.

See PLEA AND PLEADING, 5.

MILK.

See TITHES.

MISTAKE.

See AGREEMENT, 7.

A party who, under a misapprehension of his legal rights, parts with his property for a *bona fide* and valuable, but not an adequate consideration, cannot have the transaction set aside on the mere ground of mistake. *Marshall v. Collett*, 282

MODUS.

See AGREEMENT, 7.

1. Where a modus is laid with exceptions, it may be proved by some witnesses who speak to a general modus, and others who speak to the exceptions. *Hadow v. Barnett*, 164

2. A double issue may be directed to try the validity of a farm modus; the inquiry being, 1. As to the existence of the ancient farm; 2. As to payment of the modus. *Bryan v. Parker*, 170

MONASTERY.

See TITHES.

MORTGAGOR AND MORTGAGEE.

See WEST INDIES, 1, 2, 3.

PARTITION.

213

1. An equitable mortgage may be created of copyholds, by the mere deposit of the copy of court roll. It is therefore not sufficient for the protection of a purchaser or mortgagee of copyholds, that he should search the court rolls for incumbrances; he ought to require the vendor or mortgagor to produce an abstract of his title and the copy of his admission to the copyhold premises; and if the latter document is not forthcoming, its non-production must be reasonably accounted for. *Whitbread v. Jordan*, 308

2. Where the creditor of a publican in London took from the latter a legal mortgage of copyhold premises as a security for an antecedent debt, and, at the time of taking this security, knew that the publican was indebted to his brewers, and likewise was aware of the ordinary practice in London of publicans depositing their leases with their brewers by way of mortgage:—*Held*, that the creditor had such notice of the transactions between his debtor and the brewers, as would have put a prudent man on further inquiry; and that, having omitted to make such further inquiry, the equitable security of the brewers had priority over his legal security. *Ibid.*

MORTMAIN.

The taking of a husbandry lease *bona fide* by a religious house, is not within the Statute of Mortmain. *Jeans College v. Gibbs*, 145

PARISH.

See CHAPEL.

PARTIES.

See PLEA AND PLEADING.

PARTITION.

1. Where commissioners of partition are directed to divide lands equally between the parties entitled, it is their duty, after dividing the lands into portions of equal value in the

market, to assign them to those parties respectively to whom they would be of most value, with reference to their respective situations in relation to the property before the partition took place. Therefore, where commissioners were directed to divide lands equally between *A.*, *B.*, and *C.*, and they accordingly divided the lands into portions of equal value in the market, but assigned to *A.* an inn of which *C.* had been for many years the occupier, upon which he had expended money in improvements, and adjoining to which he had purchased property for the purposes of his occupation:—*Held*, that the adjudication of the commissioners was wrong, and that a commission should be directed to new commissioners, to be approved of by the Master. *Story v. Johnson*, 538

2. Gross error in judgment, without positive proof of impartiality, is sufficient to enable the Court to set aside an adjudication made by commissioners of partition. *Ibid.*

PARTNERS.

See PLEA AND PLEADING, 1.

PLEA AND PLEADING.

See MODUS.

TITHES, 8.

1. Bill, by certain persons, on behalf of themselves and the other members of a joint stock company, to which an answer was put in, and a decree subsequently made, setting aside certain contracts between the plaintiffs and the defendant, and directing various accounts and inquiries. A supplemental bill was afterwards filed in the name of the same plaintiffs against the same defendant, seeking, among other things, a specific lien on a part of the purchase-money paid to the defendant. The defendant pleaded that one of the parties named as a plaintiff in the supplemental bill, had, previously to the fil-

ing of it, parted with all his interest in the partnership or company, and had ceased to be any longer a member or proprietor of the company, and that he had not any other interest. The plea was overruled. *Small v. Attwood*, 39

2. In general an uncertificated bankrupt cannot file a bill against his assignees for an account of their dealings under the bankruptcy; nor can the bankrupt obtain this relief indirectly, by charging fraud and collusion between the assignees and a third party, where the bill states no specific acts of fraud on the part of the assignees, and prays no relief against them on the ground of fraud. *Tarleton v. Hornby*, 172

3. An information having been filed by the Attorney-General against *A.*, for an account of his dealings and transactions with the government as an army agent, *A.* pleaded in bar of the information a settled account, by means of certain clearing warrants. This plea having been overruled, *A.* filed his cross bill against the Attorney-General and the Secretary at War, alleging that the clearing warrants had been invariably treated as a settled account, but that he had only recently, and since the plea, been acquainted with the proceedings of the War Office, by which the clearing warrants were rendered conclusive. The bill then charging that the defendants had divers papers, &c., by which the truth of the several matters alleged would appear, prayed for a discovery—for a declaration that the clearing warrants amounted to a settled account, and for a perpetual quietus from all proceedings by the defendants. To this bill the defendants having demurred, on the ground that they were public officers, and also for want of equity, the demurrer was overruled. *Deare v. Attorney-General*, 197

4. The defendant in a tithe suit, who denies the rector's title, cannot, by a cross bill, compel the rector to discover the evidence of his title; there-

fore, where the rector, by his answer to such a cross bill, refused to set forth under what deed or deeds the rectory was conveyed to the persons under whom he claimed, exceptions to the answer, which had been taken on the ground of that refusal, were overruled. *Bellwood v. Wetherell*, 211

5. Where an action of trespass for mesne profits is brought against a party who has a cross claim against the plaintiff at law for money expended on the land, the Court will grant an injunction to restrain the proceedings at law; there being no right of set-off in such an action. *Lord Cawdor v. Lewis*, 427

6. A charge in the bill, that papers and documents are in the possession or power of the defendant or his solicitor, is not answered by a denial that they are in the possession or power of the defendant. *Bond v. Northover*, 221

7. A bill in equity to set aside a verdict is not sustainable, where the facts on which the bill is founded, though discovered since the trial, might have been established at the trial upon cross-examination. *Taylor v. Shepherd*, 271

8. To a bill against the assignees of a bankrupt for a general account of their dealings under the bankruptcy, one of the assignees demurred for want of equity, and the demurrer was allowed:—*Held*, that the other assignees might plead this matter in bar of the suit. *Tarleton v. Hornby*, 333

9. To a bill filed for payment of a rent-charge, one of the defendants pleaded twenty-six years possession without accounting for or paying over to the plaintiff any part of the rents and profits. Plea allowed; but, under the circumstances, ordered to stand over till a co-defendant had answered, pleaded, or demurred. *Baldwin v. Peach*, 453

10. Although a bill contain a charge that the defendant has in his custody divers deeds, papers, and documents,

by which the truth of the several matters in the bill contained would appear; yet, if it contain no specific allegation to which the charge will apply, the charge need not be answered. *Ibid.*

11. Courts of equity will presume a release within the same limits of time, within which juries will be directed to presume it, whether any Statute of Limitations is applicable to the case or not. *Ibid.*

12. A foreign judgment being equally conclusive against the debtor as an *English* judgment, may be set aside in equity for fraud. Therefore, where a bill was brought against a banker by his customer for an account, and for an injunction to restrain an action on a foreign judgment obtained by the banker from the customer in respect of their mutual dealings, and it appeared by specific allegations in the bill, that, notwithstanding the judgment, the balance of accounts was in favour of the customer:—*Held*, that the case made by the bill was *prima facie* a case of fraud in the banker, which he was bound to answer; and, consequently, his demurrer was overruled, without reference to the question whether the bill was sustainable for the account. *Bowles v. Orr*, 464

13. A bill for an account will lie against a banker by his customer. *Ibid.*

14. A mere general charge that accounts are intricate and cannot be taken without the assistance of a Court of equity, is not sufficient to sustain a bill for an account, unless the bill state circumstances from which it may fairly be presumed that the charge is true. *Ibid.*

15. To a bill filed for carrying the trusts of a creditor's deed into execution, the scheduled creditors, who have not executed the deed, need not be parties. *Prosser v. Edwards*, 481

16. After a plea submitted to, and bill amended, a demurrer may lie to the whole amended bill. *Ibid.*

17. *Semble*, that though the bill

charges certain facts, and that the defendant knew them, yet if it omit to charge that he admitted that he knew them, evidence of his admissions on that subject cannot be read. *Margareson v. Saxton*, 525

18. *Don Miguel*, as King of *Portugal*, effected a loan for the use of his Government by the issue of certain bonds, the consideration for which was paid in bills of exchange drawn upon certain bankers in *England*. The bills were made in two parts, of which the first parts were remitted to *England*, and accepted by the bankers, and the second parts were remitted to the Treasury of *Portugal*, being specially indorsed to the Treasurer of the Royal Treasury of *Portugal*, on account of the loan. After the dethronement of *Don Miguel*, the second parts of the bills came into the possession of *Dona Maria's* government, and were, by her orders, indorsed by her treasurer (the same individual who was treasurer under *Don Miguel*) to *S.* resident in *England*, with instructions to recover the amount due thereon, and remit the same to the *Portuguese* government. *S.* having brought his action on the bills against the acceptors, and a bill in equity having been filed by the acceptors against *S.* and the Queen of *Portugal*, for a discovery of the circumstances under which *S.* obtained the bills:—*Held*, upon demurrer by the Queen—*first*, that she was a proper party to the bill for discovery, although not a party to the record at law; and, *secondly*, that if the bills came into her possession by fraud, and were indorsed by her agent to *S.* under circumstances of duress, that was a defence which the acceptors, in the action brought against them by *S.*, were at least entitled to urge for the opinion of a court of law. *Glyn v. Saares*, 653

19. To a bill for discovery in aid of a defence to an action at law, a person who is not a party to the record at

law, but for whose benefit the action is brought, may, under circumstances, be made a defendant; and if that person be resident abroad, service of subpoena to appear on the attorney of the plaintiff at law may be ordered to be good service on the party so resident abroad.

Although the general rule of a Court of equity is, that a mere witness cannot be made a defendant to a bill for discovery, yet that rule will be relaxed in all cases where an absolute failure of justice would result from its application. *Glyn v. Saares*, 644

POWER.

See APPOINTMENT.

LESSOR AND LESSEE, 3.

POWER OF ATTORNEY.

See PRINCIPAL AND AGENT, 3.

PRACTICE.

See COURTS, 1, 2, 3, 4, 5.

IMPERTINENCE.

INFANT HEIR.

1. Where books, papers, and writings, mentioned in a schedule to the defendant's answer, are deposited by the defendant with his clerk in court for the inspection and examination of the plaintiff, under the usual order for that purpose; the defendant is entitled to have them restored to him so soon as such inspection and examination have taken place; and the plaintiff is not entitled to have them retained in the custody of the clerk in court, notwithstanding it may be necessary that they should be produced before the Master in taking the accounts directed by the decree, or on the hearing of an appeal from the decree. *Small v. Attwood*, 37

2. Where the time for answering has expired, and an attachment is duly taken out, the defendant cannot demur; and where the demurrer is filed on the same day on which the attach-

ment issues, the latter has the priority, without regard to hours. *Taylor v. Sheppard*, 94

3. An active step taken in a cause by defendants in contempt is not rendered valid by the subsequent tender of the costs of the contempt. Where, therefore, defendants in contempt, having put in answers which were excepted to, obtained the previous order, and afterwards tendered the costs of the contempt, the order was discharged for irregularity. *Taylor v. Sheppard*, 99

4. Where exceptions are taken to separate answers which are substantially the same, one previous order is sufficient. *Ibid.*

5. *Semble*, that defendant obtaining the previous order, need not also take out an order *nisi* for dissolving the injunction. *Ibid.*

6. Where a defendant appears to be a bare trustee for the plaintiff, and offers no explanation to the contrary, the Court will compel the production of deeds and documents admitted, by his answer, to be in his possession. *Sparke v. Montriau*, 103

7. The Court will not, upon motion before the hearing, compel an incumbrancer to produce at the hearing deeds which are admitted by his answer, but which are his title deeds, even though the plaintiff may have an interest in such deeds; but, under circumstances, the Court will direct them to be proved before the examiner. *Ibid.*

8. The mere circumstance of a defendant incorporating a deed in his answer, whether by referring to the schedule or otherwise, is not a ground for compelling its production, if in other respects such compulsion would be inequitable. *Ibid.*

9. Where facts are stated in the answer which are not contradicted, and which, if true, would lead to a material alteration in the frame of the suit, the Court will, on motion, permit the minutes of the decree to be amended,

with a view to ascertain the truth of those facts. *Harwood v. Fisher*, 110

10. Where exceptions are taken to the Master's certificate, with a general allegation that the Master is wrong in "all the particulars" complained of; then, if one of the exceptions is overruled, all must be overruled; but the exceptant will be allowed to amend, on payment of costs. *Gompertz v. Best*, 114

11. A second set of depositions taken upon the same interrogatories, rejected. *Hadow v. Barnett*, 164

12. Order to take the bill *pro confesso* discharged, and answer permitted to be filed, under the circumstances, and upon certain terms. *Lovell v. Hicks*, 230

13. Where a document is in the custody of an officer of a Court of equity, the Court will, on grounds of public policy, order the production of that document at the trial of an indictment against any individual, whether he be a party to the suit in which the document is in evidence, or not. *Taylor v. Sheppard*, 280

14. Where there are several actions against the same party grounded on the same document, and the document is in the custody of an officer of a Court of equity, in a suit instituted by the defendant at law to restrain proceedings in one of the actions, the Court, upon the application of the defendant at law, will order the production of that document at the trial of another of the actions, though the plaintiff in the latter action is not a party to the suit in equity. *Ibid.*

15. Upon a motion to revive the common injunction, the Court will hear the defendant on the merits. *Blake v. White*, 420

16. Upon the overruling of the demurrer of two defendants, who were out of the jurisdiction, the plaintiff obtained the common injunction against them for want of an answer; and the

Court, upon the application of the third defendant, who had answered, refused to grant an order nisi to dissolve the injunction. *Bowles v. Orr*, 474

17. Where, by a decree made thirty years ago, an account had been directed of a testator's personal estate and of his debts and testamentary expenses, and an injunction had been granted to restrain the Bank from permitting the transfer of a small sum of stock belonging to the testator's estate, but no further proceedings had been had in the suit; the Court, upon the petition of the only party interested, dissolved the injunction, so that an immediate transfer of the stock might be made to the petitioners, without carrying the suit any further. *De Beauffort v. Archdeacon*, 549

18. Upon a bill filed for payment of an annuity, the circumstances under which the annuity deed was executed being disputed by the parties, the plaintiff was not allowed to prove the deed *vera voce* as an exhibit, but leave was given him to file interrogatories for that purpose. *Maber v. Hobbs*, 585

19. Where an answer had been put in by an illiterate defendant, unaccompanied by any affidavit by his solicitor as to its having been read over and explained to him previously to his being sworn, and the *jurat* did not state that he had affixed his mark to it in the presence of the commissioners; ordered, upon motion, that the answer should be taken off the file, for irregularity, with costs. *Pilkington v. Himsworth*, 612

20. Objections to the form of the *jurat* of an answer cannot be waived by the parties to the suit. *Ibid.*

21. Defendant admitting by his answer that he had in his possession a promissory note on which he had commenced an action against the plaintiff, but which the plaintiff by his bill alleged to have been long since paid, was ordered to deposit the same with

his clerk in Court for the inspection of the plaintiff, although an injunction to restrain the action had been dissolved. *Ibid.*

22. Contempt of Court for non-payment of costs cannot be waived by the parties. *Gompertz v. Best*, 619

PRESUMPTION.

See PLEADING, 11.
TITHES.

PREVIOUS ORDER.

See PRACTICE, 4, 5.

PRINCIPAL AND AGENT.

1. The foreign agent of a mercantile house in London, dealing in African produce, was appointed executor of A., a merchant at Sierra Leone, with directions to sell the testator's property, and invest the proceeds in the Bank of England. The agent accordingly wrote to his principals in London, advising them of consignments which he should make to them of some of A.'s property, and directing them to place the proceeds to his credit as executor of A. The consignments were made, and the merchants placed the proceeds to a separate account, namely, that of A.'s estate:—*Held*, that the goods were specifically and not generally consigned, and that the produce of the consignments was trust money in the hands of the merchants, which, upon a motion in a suit filed against them by the representative of A. for an account, they were bound to pay into Court. *Leigh v. Macaulay*, 260

2. When a Court of equity traces out trust money in the hands of a person who has not *prima facie* a right to hold it, that money must be paid into Court. *Ibid.*

3. A power of attorney giving the agent full powers as to the manage-

ment of certain specified real property, with general words extending those powers to all the property of the principal of every description, and, in conclusion, authorizing the agent to do all lawful acts concerning all the principal's business and affairs of what nature or kind soever, does not authorize the agent to indorse bills of exchange in the name of his principal. *Esdaile v. La Nauze*, 394

4. Where an agent had permitted his principal to expend money on an estate which the agent afterwards claimed as his own, and to which his real representative established a legal title by ejectment, the Court granted an injunction to restrain an action brought by the agent's representative for mesne profits. *Lord Cawdor v. Lewis*, 427

PRINCIPAL AND SURETY.

Where a bond creditor, by agreement with his debtor, takes interest on his debt by anticipation, a Court of equity will restrain an action on the bond, whether brought against the principal or the surety. *Blake v. White*, 420

PRIVILEGE.

A barrister who had attended the Court, not professionally, but as a party interested, on a motion for a receiver, was arrested by a sheriff's officer shortly after he had quitted the Court: the officer refused to bring him into Court, and took him to a lock-up-house. On motion for his immediate discharge, the Court doubted whether he could be discharged without being brought into Court, and recommended a writ of *habeas corpus* to be issued; which having been done, and the party brought into Court, he was discharged, and the sheriff was ordered to pay the costs. *Anonymous*, 331

PRODUCTION OF DEEDS AND PAPERS.

See PLEADING, 6, 10.

PRACTICE, 1, 6, 7, 8, 13, 14, 21.

PROMOTIONS.

See MEMORANDA.

PROOF OF EXHIBIT.

See PRACTICE, 18.

RAILWAY ACTS.

See CONSTRUCTION OF STATUTE, 1, 2, 4.

RECEIVER.

The Court will not, before the hearing of the cause, appoint a receiver of the rents and profits of real estate, on the mere ground that the party making the application has a good title: no fraud or spoliation being alleged against the party in possession. *Tolderry v. Colt*, 621

RECTOR.

See PLEA AND PLEADING, 4.
TITHES, 11.

REVERSIONARY INTEREST.

See CHOSE IN ACTION.

HUSBAND AND WIFE.

RE-HEARING.

See PRACTICE.

1. The common order for re-hearing, obtained upon an application made after the expiration of six months from the time the decree was pronounced, will be discharged for irregularity; but upon a special case stated by petition, and verified by affidavit, the Court will grant a rehearing, though the ordinary time for making the application has expired. *M'Lachlan v. Rob*, 267

2. Upon a proper case, stated by

petition and verified by affidavit, the Court will relax the general order of the 13th November, 1731, which requires that all applications for a rehearing shall be made within six months after the decree is pronounced. *Halford v. Halford*, 270

REVIVOR.

See PRACTICE, 13.

SECURITY FOR COSTS.

See COSTS, 11, 12.

SEPARATION DEED.

See CONSTRUCTION OF DEED, 1.

SOLICITOR.

See COSTS.

SPECIFIC PERFORMANCE.

See AGREEMENT.

CONTRACT.

LESSOR AND LESSEE, 4.

VENDOR AND PURCHASER, 1.

STATUTE OF DISTRIBUTIONS.

See CONSTRUCTION OF DEED, 1.

STATUTE OF FRAUDS.

See AGREEMENT, 7.

STATUTE OF LIMITATIONS.

See DEBTOR AND CREDITOR.

PLEADING, 11.

TERRIER.

See TITHES.

TIME.

See AGREEMENT, 1, 3.

TITHES.

1. Issue directed to try the validity of a modus bid for a very small district, though the map attached to the answer varied from that given in evi-

dence by the defendants, and though the defendants relied on evidence of reputation to prove the bounds of the district. *Barnes v. Simons*, 129

2. The lands of smaller monasteries, which were surrendered to the king after the 27 Hen. 8, c. 25, and were, at the time of their surrender, free from tithes, are within the protection of 31 Hen. 8, c. 13, s. 21. *Ibid.*

3. To show that a monastery held lands discharged from tithes by prescription at the time of its dissolution, positive evidence must be given that the monastery existed prior to the time of legal memory; but if this evidence be given, its possession of the lands before that period may be left to presumption. *Ibid.*

4. Under the general pleading that the lands were, at the time of the dissolution, held discharged "by prescription, or other lawful ways and means," the defendants may give evidence of any legal discharge. *Ibid.*

5. A witness is not disqualified from proving the payment of a modus, on the ground of being an owner of the lands in question, unless it be clearly proved that he is an owner at the time of his examination. *Ibid.*

6. The stat. 3 & 4 Will. 4, c. 42, s. 26, does not render a man, who was sworn before the act, a competent witness afterwards. Whether that act extends to equitable proceedings, *quære?* *Ibid.*

7. *Matthew Paris* is not evidence of the establishment of the order of Franciscans in Italy. *Ibid.*

8. To a bill filed for an account of tithes, an answer containing an alternative of inconsistent defences is bad *in toto*. Therefore, where the defendants in a tithe suit set up by their answer certain yearly payments as moduses, but insisted that if the same, for any reason, were not good and valid moduses from time immemorial, they must be taken to have been payable as

a good and valid real composition, made with the assent of all parties whose assent was necessary thereto, and before the restraining statute of 13 *Eliz.*:—*Held*, that this alternative was inadmissible; that the latter branch of it could not be rejected as surplusage; and that the plaintiffs were entitled to a decree. But upon a re-hearing, held that the allegation as to the real composition was not shaped as stating a fact in the alternative, but only as introducing an argument, and therefore might be rejected as surplusage; and that the defendants, under the circumstances of the case, were entitled to an issue as to the modus. *Jesus College v. Gibbs*, 145, 445

9. *Semble*, that the decision in *Wilhis v. Stone*, 1 Y. & J. 262, is questionable. *Hadow v. Barrett*, 164

10. Agreement to lease the rectorial tithes of a parish, including the tithes of 90 acres supposed to be within the parish, but which had not paid tithes to the lessor during his incumbency, with a stipulation that the intended lessee would, within a given time, take such legal proceedings for the recovery of the tithes of the 90 acres as his counsel should advise:—*Held*, not to be within the Statute of Maintenance. *Ibid.*

11. Where an equitable lessee of tithes, having a right to call for the conveyance to him of the legal interest, had neglected to do so previously to instituting a suit for the recovery of part of those tithes, and upon the refusal of the rector to join as co-plaintiff in the suit, had made him a co-defendant:—*Held*, that he was not entitled to the costs arising from the rector's refusal to join, and that the rector was entitled to his costs. *Ibid.*

12. The words "white tithes" have no general meaning, but are applicable to distinct things in distinct parishes. The meaning, therefore, of those words, as applicable to a particular parish, is

to be ascertained only from the usage in that parish. *Becher v. Claye*, 448

TRANSFER OF STOCK.

See CONSTRUCTION OF STATUTE, 3.

TRUSTEE.

See COSTS, 7, 8, 9, 10.
WILL.

VEGETABLES.

See TITHES.

VENDOR AND PURCHASER.

See WILL, 3.

1. In an agreement for the purchase of an estate, one of the stipulations was, that the vendor should be tenant from year to year to the purchaser:—*Held*, that the inability of the vendor to perform this stipulation by reason of embarrassments of which the purchaser must have had some notice, was no bar to the specific performance of the contract. *Lord v. Stephens*, 222

2. A stipulation to give such a title as shall be *satisfactory* to the purchaser, does not authorize the purchaser to make any other than the usual objections to the title. *Ibid.*

3. Deterioration of the estate, arising from delay in completing the purchase, is not a ground for rescinding the contract, but may be the subject of an allowance to the purchaser. *Ibid.*

4. Where a contract is entered into for the sale of an estate, and, under the general words, property passes, which the vendor insists he did not mean to sell, but the purchaser by his answer denies or does not admit that it was not in his contemplation at the time of the purchase; *semble*, that the vendor cannot sustain a bill against the purchaser to have the contract rectified, on the ground of mistake, and carried into execution. *Att.-Gen. v. Sitwell*, 559

VICAR.

See CHAPEL.
RECTOR.
TITHES.

VOLUNTARY CONVEYANCE.

A conveyance made to a creditor for a valuable consideration sufficiently strong in itself to influence the debtor to make it, is not "voluntary" within the stat. 7 Geo. 4, c. 57, s. 32, for relief of insolvent debtors, though part of the consideration consists of a pre-existing debt. *Margareson v. Saxton*, 525

WAIVER.

See AGREEMENT, 2.
PRACTICE, 20.

WEST INDIES.

1. Under the stat. 2 & 3 Will. 4, c. 125, for granting relief to the *West Indies*, the commissioners have no power to advance monies except upon such securities as shall have priority over all other securities. *Borradaile v. Brickwood*, 60

2. A mortgagor out of possession is not "an owner or person interested" in the property, within the terms of the act, so as to authorize the commissioners, without consent of the mortgagees, to advance monies to him in respect of damage done by hurricanes to the mortgaged premises. *Ibid.*

3. *Semble*, that where the property has been already restored, the commissioners have no power to advance money for the purpose of reimbursing the party who has restored it. *Ibid.*

WILL.

See APPOINTMENT.

1. Testator bequeathed 2200*l.* stock, *his property*, standing in the joint names of himself and wife, to trustees, upon trust to pay the interest and dividends to his wife for her life, and, after

her decease, to distribute the capital amongst his grandchildren by name; and he directed that in case he had not that sum standing in his name at the time of his death, the same should be made up out of his other estate and effects:—*Held*, that the stock was the absolute property of the wife surviving, and that she must elect between this and the other benefits bequeathed to her by the testator's will. *Coates v. Stevens*, 66

2. Testator devised his real estates to trustees, upon trust that his daughter *M.* should until twenty-one, if sole and unmarried, receive thereout an annuity of 60*l.*, and that she should thereafter and until thirty-one, if sole and unmarried, receive a further annuity of 40*l.*; but in case his said daughter should marry without the consent of his trustees, then she should only receive an annuity of 50*l.*, and the said estates should immediately upon such marriage be in trust for the children of *M.*, under such limitations as in the will mentioned; and for default of such issue, in trust for the testator's sister *S.* Provided, that if *M.* should marry with the consent of the trustees, the estates should be in trust for her and her husband for their joint lives and the life of the survivor, with remainder to the children of the marriage, under the same limitations as before. *M.* married with the consent of the trustees, and died without issue:—*Held*, that the remainder to *S.* was not conditional, depending on *M.*'s marriage *without* consent; consequently, that notwithstanding *M.*'s marriage *with* consent, the remainder to *S.* took effect. But upon a re-hearing this decree was reversed, and it was held that the remainder to *S.* was conditional, depending on *M.*'s marriage *without* consent; consequently, that *M.* having married *with* consent, the remainder to *S.* failed, although *M.* died without issue. *Tolderry v. Colt*, 240, 621

3. Where lands are devised in trust for the payment of the testator's debts generally, with a direction that his estate at *A.* shall first be sold for that purpose, and if that be not sufficient, then his estate at *B.*; a good title cannot be made to the estate at *B.*, unless the vendor shews clearly that the trust remains unsatisfied, and that the produce arising from the sale of the *A.* property would, beyond all doubt, be insufficient for the purposes of the trust. *Pierce v. Scott*, 257

4. Testator devised as follows: "I give and devise all that my freehold lease in *P.*, and all and every my chief rents in the town of *M.*, and also my two warehouses in the said town, unto my two sons, *H. J.* and *O.*, in moieties, as tenants in common, and not as joint tenants, in such manner and subject to such charges as hereinafter mentioned, (that is to say), as to one moiety or equal half part thereof to my son *H. J.* for life, with remainder to his lawful issue and their respective heirs, in such shares and proportions and subject to such charges as he the said *H. J.* shall by deed or will appoint; but in case my said son *H. J.* shall not marry and have issue who shall attain the age of twenty-one years, then to my son *O.* in fee:—*Held*, that *H. J.* took an estate for life in the moiety, with remainder to his children

as tenants in common in fee. *Lees v. Mosley*, 589

5. Whatever be the *prima facie* meaning of the word "issue" in a will, it is not a technical expression, and will yield to the intention of the testator to be collected from the words of the will; and therefore it requires a less demonstrative context to shew the testator's intention in regard to the word "issue" than in regard to the technical expression "heirs of the body." *Ibid.*

WITNESS.

See TITHES, 5, 6.

1. A party who is directly interested in the event of an action or suit, by being liable for the costs, cannot be rendered a competent witness under the provisions of the stat. 2 & 3 *Will.* 4, c. 42, s. 26. *Jesus College v. Gibbs*, 145

2. Defendant who had put in his answer, but became bankrupt before the hearing of the cause, examined as a witness for the co-defendant. *Whitbread v. Jordan*, 303

WOODS AND FORESTS.

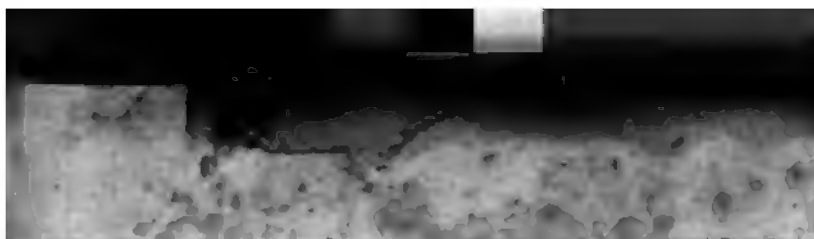
See AGREEMENT, 5, 6, 8.

WOOL.

See TITHES.

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